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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 809.
UNITED STATES, *Petitioner*,
v.
ROBERT MORSS LOVETT.

No. 810.
UNITED STATES, *Petitioner*,
v.
GOODWIN B. WATSON.

No. 811.
UNITED STATES, *Petitioner*,
v.
WILLIAM E. DODD, JR.

On Writs of Certiorari to the United States Court of Claims.

BRIEF FOR THE CONGRESS OF THE UNITED STATES

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Under House Resolution 380 and Public Law 255
78th Congress

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April 19, 1946.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Dwight, Theodore W., *Trial by Impeachment* (1867) 5

Encyclopedia Americana
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The Federalist
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No. 48 12
No. 51 12
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Hamilton, *Works*, edited by John C. Hamilton
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McLean, *Constitutional Law* 3
Mansfield, *The Comptroller General* (1939) 97, 101
May, *The Constitutional History of England* (1912 ed.) Vol. I 74, 7
Moore, *Digest of International Law*, Vol. V. 7
Simpson, Alex., *A Treatise on Federal Impeachments* (1916) 3
Taylor, *History of The Committee on Appropriations* 7
Todd, Alpheus, *Parliamentary Government in England* (1867) Vol. I 7
United States Constitution, Sesquicentennial Commission, *Formation of the Union Under the Constitution* 7
Willoughby, *The Constitutional Law of the United States* (2d Ed.)
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Wilmerding, *The Spending Power* (1943) 7
Wooddeson, *Law Lectures: A Systematical View of the Laws of England* (1792), No. 40 5

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BRIEF FOR THE CONGRESS OF THE UNITED STATES.

I.

OPINION BELOW.

The opinion of the Court of Claims entered in the above-captioned cases on November 5, 1945, has not been officially reported.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

III.

STATEMENT.

The Parties.

On December 6, 1943, the Attorney General informed the Congress that respondents herein had filed petitions in the Court of Claims seeking recovery from the United States of compensation for services rendered after the effective date of Section 304 of the Urgent Deficiency Appropriations Act of 1943, *infra*, and that at the time the President approved the act it was his view that the provision was unconstitutional. The Attorney General stated:

> "... my position concurs with the President's ... It is at odds with the position of the Congress. In these circumstances I feel that the Congress should be afforded an opportunity to be represented by their own counsel ... to file a brief and argue on behalf of the position of the Congress ... I find it impossible to advocate with conviction the views of the Congress."[1]

The Court of Claims noted the appearance of the Attorney General as follows:

> "The Attorney General, having heretofore ... taken the position that the section was unconstitutional and still adhering to that position, the Assistant Attorney General, appearing for the defendants, supports the plaintiffs." (R. 34)

---

[1] House Report 1117, 78th Congress, 2d Sess., page 3. This report also includes the Attorney General's communication of January 31, 1944, in which he stated that Counsel for the Congress "should have entire freedom in filing briefs and making oral arguments in support of the position of the Congress." (Page 4)

In the Court of Claims, as here, the Congress was represented by special counsel appointed pursuant to House Resolution 386 and Public Law 249, 78th Congress, which were adopted in order that such counsel "be permitted to defend the action of the Congress in enacting Section 304 of Public Law 132"[2] and "to represent the views of the Congress in the matter."[3]

Statute Involved.

These cases involve Section 304 of the Urgent Deficiency Appropriation Act of 1943, approved by the President July 12, 1943,[4] which provides as follows:

> "Sec. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, that this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, that this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom." (R. 22)

---

[2] Senate Report No. 724, 78th Cong., 2d Sess.

[3] See statement of Senator Hatch in explanation of Public Law 249, *supra*, Congressional Record, Vol. 90, February 25, 1944, page 2075.

[4] 57 Stat. 431, 450.

Essential Facts.

At the time Section 304 became effective, Respondents Watson and Dodd were employees of the Federal Communications Commission, having been appointed pursuant to Section 4 of the Federal Communications Act of 1934, which provides, *inter alia*, that:

> "The Commission shall have authority, subject to the provisions of the civil-service laws and sections 661 to 674 of Title 5, to appoint such other officers, engineers, accountants, inspectors, attorneys, examiners, and other employees as are necessary in the execution of its functions . . .
> "(g) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere; for office supplies, law books, periodicals, and books of reference; and for printing and binding) as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress . . ." *47 U. S. C. 154(f),(g)*

Respondent Watson continued to perform the duties of his position until November 21, 1943. He resigned May 21, 1944, not because of Section 304, but, as he explained in a letter of resignation to his executive superior, for the reason that:

> "The reduction in appropriation for the Foreign Broadcast Intelligence Service makes necessary the elimination of the Analysis Division . . . That seems to me to mark the termination of the work which I came to Washington to do and is hence an occasion on which I submit my resignation." (Fdgs., R. 24)

Respondent Watson's executive superior acknowledged this letter of resignation in part as follows:

> "It is true that the position which you held and which was kept vacant for you has been eliminated, so that there is no practical reason for continuance of you on the rolls of the F. C. C. Your resignation coming in

this way makes it very clear cut that the act is voluntary." (Fdgs., R. 25)

Dodd remained as an employee through November 21, 1943. (Dodd, Fdgs., 3, R. 30) His position, like Watson's, was abolished by his executive superiors in line with a reduction in appropriations for the Foreign Broadcast Intelligence Service.

On November 15, 1943, Respondent Lovett occupied the position of Executive Assistant to the Governor of the Virgin Islands, having been appointed under Section 23 of the Act of June 22, 1936, which provides:

> "'The Secretary of the Interior shall appoint such other executive and administrative officers as may in his discretion, be required . . . The salary of all executive officers and employees appointed . . . by the Secretary of the Interior shall be paid from funds appropriated for the Government of the Virgin Islands by the Congress in annual appropriation bills, or as may be otherwise provided by law . . .'" *48 U. S. C. 1405(c)*

Respondent Lovett continued as a federal employee until he resigned at the request of Secretary Ickes, because, according to the request:

> "this Department has been bitterly criticized by the Congress in recent months for continuing to accept"

respondent Lovett's services. (Fdgs., R. 19) Accordingly, respondent Lovett resigned March 13, 1944, approximately four months after the effective date of Section 304. (Lovett, Fdgs., 3, R. 19, 20)

On December 3, 1944, each of the respondents filed a petition in the Court of Claims to recover compensation equivalent to salary for services rendered after November 15, 1943, alleging a demand for payment thereof and a refusal because of Section 304

> "and the fact that the President did not appoint him thereunder"

The court below considered the three cases together and gave judgments for the then plaintiffs, which judgments the Court said:

> "may be satisfied by any appropriation out of which the judgments may be by Act of Congress payable" (R. 40)

(a) *History of Section 304.*

In recent years Congress has found it necessary to deal with the problem of subversive activity on the part of federal employees. This does not mean that federal employees, generally, have engaged in such activities; however, the problem was serious enough that in 1939 the Hatch Act was passed. (Act of August 2, 1939, 53 Stat. 1148) Section 9A provided:

> "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our Constitutional form of government in the United States.
>
> "(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such persons."

In June, 1940, a limitation was incorporated in the Emergency Relief Appropriation Act of 1941 (Sections 15(f), 17(b), 54 Stat. 611), as follows:

> "No alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint

resolution and no part of the money appropriated in this joint resolution shall be available to pay any person who has not made or who does not make affidavit as to United States citizenship and to the effect that he is not a Communist and not a member of any Nazi Bund Organization, such affidavit to be considered prima facie evidence of such citizenship, and that he is not a Communist, and not a member of any Nazi Bund Organization." (Sec. 15(f))

"No portion of the appropriation made under this joint resolution shall be used to pay any compensation to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States." (Sec. 17(b))

Early in 1941 Congress began the practice of including in its regular appropriation acts a similar provision, together with criminal penalties for its violation.[5]

There was much complaint that the prohibitions of the Hatch Act were not effective. Initially, under that act, complaints as to subversive activities of federal employees were referred to the employing agencies; and an FBI investigation was made only upon the request of that agency. In June, 1941, Congress took further cognizance of the problem by providing in the Department of Justice Appropriation Act a fund with the following instruction as to its use:

". . . at least $100,000 shall be available exclusively to investigate the employees of every department, agency and independent establishment of the Federal Government who are members of subversive organizations or advocate the overthrow of the Federal Government, and report its findings to Congress." (55 Stat. 292)

The reports submitted to Congress were in summary form only, and did not inform the Congress of the organizations

[5] See 55 Stat. 92, Sec. 5; 55 Stat. 265, Sec. 504; 55 Stat. 303, Sec. 7; 55 Stat. 366, Sec. 10; 55 Stat. 408, Sec. 3; 55 Stat. 446, Sec. 5, 704.

considered by the Attorney General to be within the scope of the inquiry.

Before the first report of the Attorney General was received, the Congress had made an additional appropriation of $200,000 for a continuation of the FBI investigations. (Department of Justice Appropriation Act for 1943, 56 Stat. 468, 482)

Another phase of the matter deserves mention. In August, 1939, the Russian-German alliance was announced. Following the announcement of this pact, Communists and the Communist Party were bitterly criticized in this country. Until Germany invaded Russia in 1941, those who followed the Communist Party line were opposed to the entry of the United States into the war against Germany. Impetus therefore was given to the organization and promotion of so-called "Communist-front" organizations, which enlisted the sponsorship and support of many eminently respectable people but which, at the same time, furnished a refuge for those who followed the Communist Party line and who, for many reasons, including, no doubt, the prohibitions of the Hatch Act, did not desire to identify themselves as members of the Communist Party.*

Growth of these so-called "front organizations" was recognized by various agencies of government. The Special House Committee on Un-American Activities called attention to them. In his opinion in the Harry Bridges deportation case (May 28, 1942) the Attorney General said:

> "Testimony on 'front organizations' showed that they were represented to the public for some legitimate reform objective, but actually used by the Communist Party to carry on its activities pending the time when the Communists believe they can seize power through revolution. The Party took control of the Workers' Alliance as a medium through which to organize the unemployed, 'to develop widespread militant mass

* In this connection, see Decision and Order of Removal, Secretary of Labor, in the Matter of the Removal of Helen Miller, Aug 1, 1941.

struggles,' and 'to build the revolution through association in 'a militant class-conscions unemployed organization.'

"Other Communist front organizations were the International Labor Defense, whose immediate purpose was to defend Communists, but among whose members were many non-Communists unaware of its Communist control; the All-American Anti-Imperialist League, the American Negro Labor Congress, and the American League Against War and Fascism."

Again, the Attorney General in his first report after the FBI's special investigations were ordered, said:

"Moreover, it is now clear that the objective test of membership in a 'front' organization is thoroughly unsatisfactory. Appraisal of an individual's political opinions and points of view is difficult enough at best. The objective test fails completely where 'subversive' character is so imperfectly indicated and where the purposes of the organization are so stated as to make membership in most circumstances consistent with loyalty." (House Doc. 833, 77th Cong., 2d Sess., P. 4)

Under the first appropriation of $100,000 the FBI, up to August 22, 1942, had dealt with complaints against 4,579 federal employees. Of these, about 1,100 names were supplied by the House Committee on Un-American Activities. By the same date the FBI had completed and forwarded to the executive agencies concerned 2,095 reports, and in 1725 cases had been informed by the employing agencies of the disposition of the cases. Net result: Thirty-six persons

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The Attorney General also referred to the National Students League and the Youth Congress as "both identified as front organizations of the Communist Party." Opinion in Bridges Case, p. 25. The name of the American League Against War and Fascism was changed to American League for Peace and Democracy in 1937. In 1940 it became the American Peace Mobilization. After Germany invaded Russia, it became the American People's Mobilization. (See hearings on H. Res. 282, Vol. 17, Sept. 27, 28, 29; October 3, 4, 5, 1944, p. 10280).

were reported separated from the federal service, only two of whom were on the Congressional list. Thirteen other persons had been "reprimanded or transferred from national defense employment." (House Doc. No. 833, 77th Cong., 2d Sess., pp. 17, 18)

Results of further investigations followed the same pattern. (House Doc. 51 and 162, 78th Cong., 1st Sess.) By March 31, 1943, the number of employees complained of had risen to 4,948; the number of completed investigations had risen to 2,303; and the executive agencies had "closed" 2,118 cases. They reported a total of forty-three separations from the federal service and thirty-nine cases of other administrative action. From the 1,100 names on the Congressional list, investigations of which had been completed, four persons were separated and two others were the object of some other administrative action.

This, then, was the situation in the Spring of 1943, when Congress came to consider its regular annual appropriation bills for the ensuing fiscal year. The Hatch Act, obviously, was inadequate to deal with cases of subversive activity and affiliations generally due to its limited coverage and the admitted difficulties of application.* Nevertheless, Congress had received widespread complaints of such activities and affiliations on the part of some federal employees. The executive department, through the Attorney General, had expressed strong opposition to a continuance of the FBI investigations for which Congressional appropriations had been made. If the subject were to be dealt with effectively, it appeared to the Congress that some additional legislation would be necessary. Attempts had already been initiated by an amendment to the Treasury and Post Office Appropriation Bill to provide that

> "no part of any appropriation contained in this Act shall be used to pay the compensation of"

* See the Secretary of Labor's Decision, Matter of Helen Miller.

thirty-nine individuals named in the House on February 1, 1943, by the Chairman of the House Committee on Un-American Activities. (Cong. Rec., Vol. 89, P. 624)

The legislative precedents clearly supported the power of the house to condition the expenditure of public funds and to provide that no part of any funds appropriated in the particular bill or in any future bill should be used otherwise than as directed by Congress.[9]

However, when it was proposed in the House to restrict payment of salaries to the thirty-nine named individuals above referred to by amendment of the pending appropriation bill, objections, based on policy grounds, were made; and it was determined to create a special committee (the Kerr Subcommittee)[10] to inquire into the facts and to recommend appropriate legislation.

On a number of other occasions, amendments withholding funds for individual salaries had been adopted by the House without prior consideration in the Committee on Appropriations. H. Res. 105[11] authorized a subcommittee of the Committee on Appropriations to carefully consider amendments of this type prior to action on the floor of the

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[9] See section entitled "Respondents' position is not supported by legislative precedents."

[10] The Chairman of this subcommittee, Judge John H. Kerr, of North Carolina, has been a Member of Congress for twenty-three years. The other members were Representatives Anderson, of New Mexico (now Secretary of Agriculture); Gore, of Tennessee; Keefe, of Wisconsin; and Powers, of New Jersey.

[11] H. Res. 105 authorized and directed the subcommittee (hereinafter referred to as the "Kerr Subcommittee") to "examine into any and all allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Government of the United States. Such examination shall be pursued with the view of obtaining all available evidence bearing upon each particular case and reporting to the House the conclusions of the committee with respect to each such case in the light of the factual evidence obtained . . ."

House. The Special Appropriations Subcommittee was created to give respondents and others a hearing, not as a matter of right, but, as stated by Representative Vorys, "a chance to have their say." (Cong. Rec., Feb. 9, 1943, Vol. 89, P. 777)

During the debate on H. Res. 105, Representative Vorys explained the problem as follows:

> "Congress has the power to refuse to appropriate for an individual just as it has the power to appropriate for an individual. We exercise both these powers constantly when we pass or refuse to pass private bills.
>
> "It is good legislative practice, however, and good business, and good sportsmanship, to give a man a chance for a hearing before taking action on his affairs. *This is not a trial, for there is no criminal charge involved, and no one has a property right in a public job;* but it is sound human nature to hear a man's story when dealing with his affairs and it will make us proceed more carefully. I think, however, we will have to proceed. We should not appropriate for Communists and fellow travelers in Government service, as soon as they are fully identified. On the other hand, we should give them *not a day in court, for this is not a court matter, but a chance to have their say* before we act." (Italics supplied) (Cong. Rec., Vol. 89, P. 777)

The author of H. Res. 105, Representative Cannon,[12] Chairman of the Committee on Appropriations, made the following explanation of the resolution:

> " . . . the only change provided by this resolution from the established order is that under the present

[12] An eminent authority on parliamentary law, Chairman Cannon is editor and compiler of "Precedents of the House of Representatives," by Act of Congress; editor of two editions of the Manual and Digest of the House of Representatives, 1916 and 1918; author of A Synopsis of the Procedure of the House, 1919, of Procedure in the House of Representatives, 1920 and 1943, of Cannon's Procedure, 1928 and 1939, and of treaties on parliamentary law in Encyclopaedia Britannica, 1929 and 1938, and in the Encyclopaedia Americana, 1940.

system we have to wait until we reach the bill which carries that particular salary before taking action:

"The one thing this resolution does, and it is infinitesimal in importance in comparison with the time we have spent on the subject, is that it permits us to take action at once instead of waiting for the appropriate bill to come along. In other words, this resolution permits us to take action on all such cases at one and the same time instead of taking them up one by one in bill after bill as the annual supply bills are reported to the House during the session." (Cong. Rec., Feb. 9, 1943, Vol. 89, P. 779)

The Kerr Subcommittee held executive sessions in accordance with the rules of the House of Representatives. The committee placed no injunction of secrecy upon the record of its hearings. On the contrary, respondents' testimony in their own behalf was officially reported and printed for public distribution,[13] discussed in open debate in both houses of Congress, and references to all of the evidence necessary to support the committee findings were spread upon the public record in the following documents:

(1) The Subcommittee Report of April 21, 1943 (House Rept. 448, 78th Cong. 1st Sess., p. 3)

(2) The Subcommittee Report of May 14, 1943 (Id., p. 1)

(3) "Exhibits Relating to Goodwin B. Watson" (Hearings, Special Subcommittee on Appropriations, 78th Cong., 1st Sess., p. 258)

(4) "Exhibits Relating to Robert Morss Lovett" (Id., p. 201)

It is well settled by Congressional practice that:

"It is for the committee to determine, in its discretion, whether the proceedings of the committee shall be open or not" (See Rules and Manual, U. S. House of Representatives, 1943, p. 129)

[13] Hearings, Special Subcommittee of the Committee on Appropriations, 78th Congress, 1st Sess.

As a matter of fact, it was generally understood by the sub committee that respondents *desired* to be heard in executive session. This was clearly indicated by respondent Watson when he testified earlier before the Special Committee on Un-American Activities. Respondent Watson told the committee that one of his objections to their past hearings was that the employees

> "were tried in the newspapers rather than as we have worked this afternoon, *in executive session*" (Italics supplied) (Hearings Before a Special Committee on Un-American Activities, Vol. 7, Exec. Hearings, p. 3294)

No witnesses accompanied respondents to the hearings; and no request for witnesses was made by respondents. (R. 21) On the contrary, respondents clearly indicated by their conduct and statements that they did not desire to produce witnesses nor to furnish any further evidence in this matter. (R. 20, 21; 27; 30, 31)

In this connection, Chairman Kerr advised the House:

> "No person appearing before this committee has asked for counsel and no person has been subpenaed to appear before this committee. The question of the right of counsel has never been raised. These parties have appeared in response to a letter inviting them to appear if they desired to do so and make such explanations or statements as they cared to make in connection with the allegations and charges." (Cong. Rec., June 15, 1943, Vol. 89, p. 6013)

Acting under the mandate contained in H. Res. 105, the Kerr Subcommittee proceeded to

> " . . . procure the evidence in each individual case from each department or agency of the Government . . ."

and also

> " . . . from the Special Committee to Investigate Un-American Activities, the Federal Bureau of Investiga-

> tion, the United States Civil Service Commission, the Interdepartmental Committee, and the Federal Communications Commission" (Hearings, Subcommittee of the Committee on Appropriations, 78th Congress, 1st Sess., p. 329)

Respondents were *invited* to appear before the Kerr Subcommittee and were

> "... given at the hearing full opportunity to make any statements or explanations desired with respect to the subject matter of the investigation" (R. 21, 27, 31)

Respondents were thoroughly familiar with the charges which originated in and were made by the Committee on Un-American Activities; no charges were formulated by the Kerr Subcommittee.

More than twelve months before respondents appeared at the Kerr Subcommittee hearing, the Committee on Un-American Activities charged that respondents Dodd and Watson had been associated with many of the "Communist front" organizations later mentioned in the Kerr Subcommittee report. As early as February 6, 1942, these charges were discussed on the floor of the House and published in the Congressional Record.

The so-called "charges" against respondents were contained in a speech delivered by Representative Dies on the floor of the House on February 1, 1943, published in the Congressional Record, and widely publicized more than two months before the first hearing before the Kerr Subcommittee. Not only were respondents' activities widely publicized, *but prior to the Kerr Subcommittee hearings* they were all examined with reference thereto by the House Committee on Un-American Activities,[14] the Federal Bureau of Investigation, and, presumably, by their superiors in the departments in which they were employed. Respondent,

[14] See hearings before the House Committee on Un-American Activities, Vol. 7, 78th Cong., 1st Sess.

Lovett was also examined at length by the House Subcommittee on Interior Department Appropriations.[15]

An examination of the hearings before the Committee on Un-American Activities held prior to the Kerr Subcommittee hearings will disclose that respondents were examined on substantially every activity covered during the Kerr Subcommittee inquiry. Respondents, therefore, were thoroughly familiar with the charges.

Chairman Kerr stated the subcommittee's position as follows:

> "You must understand that *your subcommittee was not employed to remove anybody from office.* We were not delegated to *remove* anybody from office. This House simply requested this committee to examine the facts and the charges made against various people here who had been charged with activity which was subversive of our form of government and which had for its purpose its overthrow and destruction."

Chairman Kerr continued:

> "This Congress has the right to say to whom the people's money shall be paid . . . The question involved here is one that simply involves that proposition . . ." (Cong. Rec., Vol. 89, May 18, 1943, p. 4652)

Upon its failure to appoint respondents thereunder, the executive department terminated their salaries in full compliance with Section 304 of the act. Respondents now find themselves in a wholly untenable position. They assert that the failure of the President to submit them to Senate scrutiny was due to a belief that Section 304 was unconstitutional; yet they necessarily admit that by terminating their salaries pursuant thereto, the executive department acted upon the presumption that said section was constitutional and effective as to prohibiting the withdrawal of funds from the Treasury for payment to respondents.

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[15] See hearings before the Subcommittee on Interior Department Appropriations, April 14, 1943.

A fair analysis of the legislative history of Section 304 reveals a complete refutation of the contention that the House forced the Senate to adopt Section 304. The Senate's refusal to concur immediately in the original version of the proviso was due, at least in part, to the fact that the Senate had been misinformed by the executive department as to the nature of the proceedings in the Kerr Subcommittee and in the House, as well as in regard to the true character of the respondents.

Moreover, the Senate never voted to reject Section 304 in its final form as a separate proposition. It cannot be maintained that the Senate rejected the conference report on the Urgent Deficiency Appropriation Bill merely because it disapproved Section 304 thereof. Senator Revercomb told the Senate that the conference report was not rejected simply because it contained Section 304, but for

> "* * * a much more important reason, in my opinion—there had been defeated in conference a provision restricting the use of an emergency fund given into the hands of the President. . . . The Senate wrote into the bill, with respect to the use of that fund, a provision that no part of the fund should be used by the Chief Executive for any agency or for any purpose for which the Congress had refused to make an appropriation * * *."
>
> "For that reason, I urge upon this body that the report be rejected, and that we adhere to our position that the limitation be placed upon the funds, as we previously decided should be done . . ." (Cong. Rec., June 29, 1943, Vol. 89, P. 6817)

The Senate never did agree to the conference report until it had been revised to include an amendment providing that no part of certain funds could be used

> ". . . to finance a function or project for which function or project a budget estimate of appropriation was transmitted . . . during the Seventy-eighth Congress and such appropriation denied after considera-

> tion thereof by the Senate and House . . . or by the Committees on Appropriations of both bodies." (See House Rept. 661, 78th Cong., 1st Sess.)

Senator McKellar was of the opinion that the conference report

> ". . . was defeated because that part of it was not in."

and he stated, further, that had the conference report contained the restriction upon the use of the emergency fund when the previous votes were taken, it " . . . would probably have been agreed to." (Cong. Rec., June 29, 1943, Vol. 89, p. 6854)

The clause in Section 304 which conditions the use of appropriations upon respondents' appointment by the President with Senate concurrence did not originate in the House—it was conceived in and proposed by the Senate. How can it be said that Section 304, which, in its final form, was drafted by the Senate, was forced upon that body by the House? On the contrary, the Senate first passed Section 304 in its final form and recommended that the House concur therein. (See conference report as reported by Senate Conferees, approved by the Senate, Cong. Rec., July 2, 1943, Vol. 89, P. 7078)

The use of funds with which to pay respondents' salaries is conditioned upon their appointment by the President and confirmation by the Senate. Certainly, the Senate could not be said to have opposed this proposition, since, at the time Section 304 was pending and only about two weeks prior to its passage, the Senate, by a decisive vote, enacted a bill which provided, *inter alia*, that every incumbent of

> "an office or position in or under the executive branch of the Government of the United States . . . who receives compensation amounting to $4,500 or more per year for his services"

shall be appointed by the President and confirmed by the Senate prior to June 30, 1943.[16]

The principle of requiring certain classes of employees, *including incumbents*, to be appointed by the President with Senate concurrence had been approved by the Senate in other instances—Congress passed, and the President approved without protest, the Act of October 26, 1942, which provided as to certain items:

> "That no part of this appropriation shall be available to pay the salary of any *person* at the rate of $4,500 per annum or more unless such person shall have been appointed by the President, by and with the advice and consent of the Senate." (Italics supplied) (P. L. 763, 77th Cong., 2d Sess., Second Supplemental National Defense Appropriation Act, 1943)

The record does not support respondents' statement that the proceedings of the Kerr Subcommittee were "secret." (R. 6, 11, 16)

On June 15, 1943, the Chairman of the Appropriations Subcommittee made the following statement to the House:

> "There seemed to be much confusion in the Senate as to what had transpired in the House and before the Appropriations Committee of the House, and particularly as to the hearings before the subcommittee of the Appropriations Committee.
>
> "Senator McKellar requested from the Kerr committee the transcripts of evidence in the above hearings a few days before this matter was taken up in the Senate and the evidence was promptly furnished to him. It was not contemplated that this evidence would be printed at least until all hearings were completed. A number of the Senators seemed not to have a clear

[16] The Bill (S. 757) was passed by the Senate June 14, 1943 (Cong. Rec., Vol. 89, p. 5915, Daily Edition) and provided, further, that any incumbent not so appointed might "continue to hold such office or position until his successor is appointed," [if a successor be nominated prior to June 30, 1943] but in any event not later than September 30, 1943.

understanding of what had transpired or what the procedure had been in reference to these hearings . . .

"It is very evident that there was a general misunderstanding among the Senators as to the proceedings upon which the House passed the amendment in relation to Drs. Watson, Dodd, and Lovett . . . The Senate has never been denied the opportunity 'to peruse the evidence.' The transcripts have been available at all times to any and all of the Members of the Congress and in a number of instances Members of Congress have called for these transcripts and have examined them. All the transcripts were turned over to Senator McKellar by the Clerk of the special subcommittee. The exhibits in these cases are voluminous and are and have been available to all Members of Congress, but to deliver them from one office to another would require trucks, or wheelbarrows to transport them. * * *

"In addition to this testimony taken before the Kerr committee there were several hundred pages of testimony taken before the Dies Committee and each of these men were examined by representatives of the FBI and by representatives of other committees and departments, all of which evidence is now and has been at all times available to the members of Congress or to other interested parties." * * *

"A great deal of confusion seems to have arisen in the minds of the Senators through the reading of the statement of Secretary Ickes which has been (also) broadcast throughout the Nation." (Cong. Rec., Vol. 89, P. 6012, 6013, June 15, 1943)

It was primarily at the insistence of the Attorney General that the material before the subcommittee, particularly that from the FBI and the Attorney General's Interdepartmental Committee, was treated as confidential by the Kerr Subcommittee.

Representative Keefe, a member of the subcommittee, explained to the House:

"... That much of the material furnished by the F.B.I. and the Army and Navy Intelligence was regarded as highly confidential and we assured them that if we

used if in our examinations it would not be made a public record." (Cong. Rec., May 18, 1943, Vol. 89, P. 4670)

The Kerr Subcommittee hearings contained only the sworn testimony of respondents in their own behalf. Material in the form of letters, memoranda, etc., was not included. Against the several letters written by respondents' friends in their behalf, there was a mass of material unfavorable to them. Exclusion of all this material was, obviously, proper; but if any error was made, it was of advantage only to respondents, since from their standpoint their own testimony was, obviously, the most favorable material the committee could have published.

It will be seen, therefore, that:

Respondents were not given a "public trial" or a "jury trial" because the proceedings were not, in any sense, a criminal or other judicial proceeding, but a legislative investigation.

Respondents were fully acquainted with the "charges" against them.

Respondents were not denied the assistance of counsel. They never asked for it.

Respondents were not denied an opportunity to produce witnesses or evidence. They all agreed they had been given the opportunity to produce anything they desired.

Respondents never requested the compulsory process of the subcommittee in their own behalf.

The only evidence submitted to Congress by the Kerr Subcommittee was that based upon admissions furnished by the respondents themselves.

The stipulations signed by the Attorney General and counsel for the respondents, which were incorporated in the Court of Claims' decision as findings of fact, completely negative any claim of lack of due process in the proceedings of the Congressional committee.

(b) *The Court of Claims Decision.*

The decision of the Court of Claims may be summarized briefly in the language of the court itself, as follows:

> "The claim made is only for *salary* of the office during the time of service, and no longer." (R. 36)
>
> " . . . in the case we have here Section 304 makes no attempt to change or do away with compensation attached to the offices held by the plaintiffs. It merely stopped payment in three specific instances . . . regardless of obligation . . . (R. 39, 40)
>
> "The statute did not separate the plaintiffs from office, it did not take away the salary of that office, it did not prohibit plaintiffs from receiving their salaries. The Act did not provide an appropriation for the payment of their salaries. The appropriation for the pay period was there, but it was not made use of. The plaintiffs were appointed lawfully, they continued in office lawfully. Section 304 is [in] no way disqualified them, and we can find no rational basis for construing the Act otherwise than as a mere stoppage of disbursing routine, nothing more. To construe it as something more is to volunteer inferences. Whether the Congress had the constitutional authority to stop payment, within the limitations of the Act, is immaterial. That which is material is that the salaries have not been paid, that the obligation was never destroyed, and that the obligation continues to this day." (R. 40)
>
> "In the conclusion arrived at, it is immaterial whether Section 304 . . . is constitutional or not. We do not decide that question. The plaintiffs are entitled to recover in either event." (R. 41)

With respect to respondents' contention that Section 304 makes respondents ineligible for future government employment, the court said:

> "But in the cases before us we have for consideration only one specified period of employment, and the conditions of that specific employment. We cannot introduce situations which are not before us, and which may indeed never come into being . . . *California* v. *San*

Pablo, etc., Railroad, 149 U. S. 308, 314." (R. 36, 37) "We are not here concerned with other situations; other times." (R. 38)

In short, the Court of Claims held that respondents were not removed from office, but based its judgment upon the erroneous assumption that respondents had occupied offices to which a fixed salary had been attached by statute, and that Congress did not intend by Section 304 to affect an obligation to pay respondents but merely to prevent payment by disbursing officers regardless of obligation.

In three separate concurring opinions, Judges Whittaker, Jones, and Madden expressed views which are admittedly difficult to reconcile with "the opinion of the Court," although wholly irrelevant to a consideration of these cases on writs of certiorari. While each of the concurring opinions expressed the view that Section 304 is repugnant to the Constitution, a majority of the court did not agree upon any common reason for such repugnancy. Moreover, since the official opinion of the court is clear and unambiguous, the separate views appended thereto are entitled to no more than the usual weight of dicta—or, in the language of Judge Madden, such views are merely "additional observations."[17] (R. 44)

IV.

SPECIFICATION OF ERRORS.

The Solicitor General's petition herein states the questions presented as follows:

> "1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' services, and not merely to prohibit disbursing agencies from paying their salaries.

[17] In any event, only one member of the court, Judge Madden, expressed the view that respondents were removed from the positions they held.

"2. If so, whether Section 304 is constitutional.

"3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder, the United States incurred a legal obligation to pay respondents for services rendered after November 15, 1943.

"4. Was the Court of Claims presented with justiciable controversies."

It will be noted that the petition does not raise questions as to the constitutionality of the statute except in the event the court should conclude that Section 304 "undertook to terminate the respondents' services." Otherwise, the only questions raised by the petition are the third and fourth, above.

V.

ARGUMENT.

Summary of Argument.

The Court of Claims held that Section 304 did not undertake to remove respondents; it dealt with payment of compensation, not with office; respondents continued in their offices or positions after the effective date of the statute, and the present suits involved only a claim for salaries for a brief period following November 15, 1943, in each instance.

With this conclusion we agree. We do not question the decision of the court below in so far as it found that respondents' services were not terminated by Section 304.

Since Section 304 did not purport to remove respondents, the petition for certiorari does not present any constitutional questions requiring decision by this Court.

The Congress is of opinion that these cases do not present justiciable controversies.

We submit that the Court of Claims erred in holding that although Congress provided by Section 304 that respondents could not be paid for services after November 15,

1943, it nevertheless intended to leave the employing executives free to incur an obligation on the part of the United States to pay respondents for services after that date. We contend that the legal effect of Section 304 was not merely to prevent disbursement of funds but to limit authority of the respective employing agencies to create an obligation to respondents, that no obligation arose, and hence, the claims should have been dismissed.

It was clearly within the constitutional competency of Congress in its exclusive control over public funds to provide, as it did in Section 304, that no part of the public funds should be used to pay respondents after some future date. Such refusal on the part of Congress is supported by legislative precedents, has never been denied by the judiciary, and, particularly in view of the Court of Claims decision that no removal was effected, infringed no constitutional or legal right of plaintiffs and no prerogative of the executive department.

The Claim That Section 304 is Unconstitutional Does Not Present Justiciable Questions.

The respondents asked the Court of Claims to declare Section 304 unconstitutional. On behalf of Congress we contended before the Court of Claims that questions regarding the constitutionality of Section 304 are not justiciable. That court did not pass on the constitutional issues and rendered no ruling on the question of justiciability.

In the petition for the writs of certiorari, the Solicitor General requests this court to rule on the constitutionality of the provision, if it be found that its effect was to remove respondents from office. At our request the Solicitor General included among the questions presented in the petition for writs of certiorari the question, "Was the Court of Claims presented with justiciable controversies?" That question was raised at our request, and logically precedes all others in the petition.

It is our contention that questions regarding the constitutionality of Section 304 are not justiciable, because they are political in nature.

Section 304 was a plain and unequivocal mandate to all disbursing agencies directing them not to withdraw moneys from the public Treasury after November 15, 1943, in order to pay respondents, unless the stipulated condition was met. Regardless of respondents' assertions concerning the effects of that prohibition on the rights and privileges respondents alleged they possessed, the provisions was an order from the legislative branch to the disbursing agencies of government not to disburse funds from the Treasury for a particular purpose. The Court of Claims said:

> "The closer the statute is examined, the more clearly does it appear that with reference to the particular situation we have here, Congress confined itself to one thing—prohibiting disbursing agencies from paying the salaries of the plaintiffs." (R. 37)

A request that the court declare that action unconstitutional is a request that the judiciary countermand the order. An effective judgment that Section 304 is unconstitutional would deny to the legislature the power to prohibit the disbursement of public moneys to respondents. As stated in *Norton* v. *Shelby County*, 118 U. S. 425, 442; 30 L. ed. 178, 186, an unconstitutional law is "in legal contemplation, as inoperative as though it had never been passed."

If questions regarding the constitutionality of Section 304 are justiciable, the court therefore must possess the power to declare inoperative a statute which prohibits the disbursing agencies from spending money for a purpose for which the Congress has determined expenditures shall not be made.

The exclusive control over disbursements of funds in the public Treasury is vested in the Congress by reason of the constitutional provision that:

> "No money shall be drawn from the Treasury but in consequence of appropriations made by law." (Article I, Section 9, Clause 7)

Neither the judicial nor executive branches of government may withdraw any part of such funds for any purpose except pursuant to an appropriation made by the legislature. *Hart* v. *US*, 16 C. Cls. 459, 484, Affirmed 118 US 62; *Reeside* v. *Walker*, 11 Howard 272, 291; *Knote* v. *United States*, 95 US 154; *Osborn* v. *US*, 91 US 474; *Cincinnati Soap Co.* v. *US*, 301 US 308; *Spaulding* v. *Douglas Aircraft*, 60 F. Sup. 985; *Collins* v. *US*, 15 C. Cls. 22. Congressional control over the disbursing process is exclusive and complete.

The court therefore may not declare inoperative a statute which forbids the executive agencies of government to withdraw funds. Such a decision would be a clear intrusion upon the exercise of a function committed solely to the legislature and not subject to review or modification by the judiciary. *Spaulding* v. *Douglas Aircraft*, *supra*, is directly in point. In that case the company sued for a declaratory judgment, declaring the Renegotiation Act (50 USCA, App. Sec. 1191) unconstitutional. Dismissing the action for failure to state a justiciable controversy, the court said:

> "Congress in making appropriations has the power and authority not only to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may expend such appropriations. Thus the War Department was required to make the Renegotiation Act a part of all its contracts.
>
> "The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same. Any attempt by the judicial branch of our government to interfere with the exclusive powers of Congress would be a

plain invasion of the powers of said body conferred upon it by the Constitution of the United States."

Examination of the circumstances under which the constitutional questions are presented in these cases illustrates the applicability of the doctrine there declared and the non-justiciable character of the issues raised. Prior to the enactment of Section 304, as the respondents Watson and Dodd in their petitions stated, the Secretary of the Federal Communications Commission was authorized "to approve before presentation for payment itemized vouchers for all expenditures of the Federal Communications Commission which may be necessary for the execution of its functions, including compensation to plantiff, and which may be appropriated for by Congress, as provided by the Communications Act of 1934 (48 Stat. 1066, as amended, 47 USCA Sec. 154(g))" (R. 8, 13)

Prior to the enactment of Section 304, as respondent Lovett stated, the Secretary of the Interior or someone acting on his behalf had the duty of signing all requisitions for the advance or payment of money out of the Treasury for expenditures upon business of the department, including expenditures for the administration of the Virgin Islands, and including expenditures for the payment of respondent's salary as provided by the revised statute, Section 44, as amended, 5 USCA 487, and the Act of June 22, 1936, 49 Stat. 1813, 48 USCA Sec. 1405v. (R. 2). Section 304 ordered those agencies not to "use" any of the moneys appropriated for them in order to compensate respondents after November 15, 1943. It operated to curtail the disbursing power previously granted them.

An effective judgment that Section 304 is unconstitutional would make Section 304 inoperative for any purpose from the date of its enactment, and under the prevailing circumstances would amount to a judgment that on and after November 15, 1943, the executive agencies concerned were, by reason of the earlier legislation, empowered to

withdraw funds in order to pay respondents. If binding on the Congress, and judgments within the constitutional power of the court to make are binding on the legislature, the judgment would operate to overrule the Congress and countermand the order contained in Section 304 prohibiting such disbursements.

Thereby the court indirectly would be exercising a control which belongs exclusively to the legislature. The statement by Mr. Justice Black in *Coleman* v. *Miller*, 307 US 433, 459 is directly in point. Referring to the exclusive power Congress possesses over the amending process of the Constitution, in a concurring opinion in which he was joined by Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Douglas, Mr. Justice Black declared:

> "Congress possessing exclusive power of the amending process cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore any judicial expression amounting to more than a mere acknowledgment of exclusive congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority."

When Congress exercises its exclusive power over the disbursing process as it did in Section 304, its action is not subject to review or revision by other departments of government, and questions concerning the constitutionality of its action are not justiciable.

Section 304 Prevented the Executive Agencies From Creating Any Obligation to Pay Respondents for Services Performed After November 15, 1943.

The Court of Claims held that Section 304 did not affect the obligation to compensate respondents for services performed after November 15, 1943, although it effectively

prevented the payment to them of any money by the Federal Communications Commission or by the Secretary of the Interior during that period. In the opinion of the court, the provision was not intended to disturb the obligation, but merely to prevent the transmittal of funds to which the respondents might become entitled.

The court's opinion indicates that the conclusion was based entirely upon the court's construction of the statutory language. Referring to the use of the word "available" in Section 304, the court decided that money was available to pay the salaries in question and the provision was merely "a direction not to pay for the isolated services here rendered." (R. 36)

The Court of Claims expressly found that Section 304 did not remove respondents from office (R. 37); did not remove the compensation from the offices they properly held (R. 40); and did not constitute a refusal to appropriate for the payment of compensation affixed to those offices, as distinguished from payment to the respondents (R. 40). Having thus concluded, the court was impelled to find

> "... that it is impossible to conclude that Congress meant that in the final outcome, service was to be free to the Government because the plaintiffs were, in its opinion let us say, unfit for office. It is plain that the plaintiffs, if unfit, were just as unfit serving the Government for nothing, as serving it for something. There is no logic to the proposition that the plaintiffs were to serve the Government for nothing. The proposition is irrational. Unfitness could not be converted into fitness by withholding salary. Yet the statute allowed these plaintiffs to continue in office." (R. 38)

However, it may be noted that the decision of the court, to wit, that Section 304 did not disturb the obligation to compensate respondents, necessitates the abhorrent conclusion that when it enacted Section 304 the Congress intended to leave the power of the Federal Communications Commission and the Secretary of the Interior to create an

obligation untouched, and at the same time to serve advance notice that the Congress would not honor the valid obligations resulting from its exercise.

It is a well-established rule that the court may not refuse to give effect to legislation merely because the judiciary deems the result anomalous. *United States* v. *Barringer*, 188 U. S. 577, 580; 47 Law. Ed. 602, 604. Authority supports the proposition that under the circumstances present in these cases the Congress may, by the method adopted in Section 304, prevent the creation of an obligation to pay for future services. It is submitted, therefore, that the decision of the Court of Claims which necessitates the premise that the legislature intended to repudiate a valid obligation of the government cannot be sustained.

The opinion of the Court of Claims evidences a disposition to regard the legislative power concerning compensation of officers and employees of the government as one applicable only to office and position, and not as one exercisable in personam. However, examination of the constitutional powers regarding office, appointment, compensation and expenditure of the public funds reveals that that premise is untenable.

The Constitution itself creates certain offices and delegates to the President the power to appoint "ambassadors, other public ministers and consuls" by and with the advice and consent of the Senate. (Article II, Section 2, Clause 2). All other offices and positions in the federal government are created directly or indirectly by the legislature. *Cochnower* v. *U. S.*, 248 U. S. 405, 63 Law. Ed. 328; *Glavey* v. *United States*, 182 U. S. 595, 45 Law. Ed. 1247; *United States* v. *Andrews*, 240 U. S. 90, 60 Law. Ed. 541.

Compensation is not a constitutional incident of any office or position resulting from legislative action. The Constitution vests a right to compensation in the President (Article II, Section 1, Clause 6) and in the judges of the federal courts (Article III, Section 1). In all other cases the legislature has exclusive control over compensation.

In *Embry* v. *United States*, 100 U. S. 680, 685, 25 Law. Ed. 772, 773, a case in which the court denied the claim of a suspended postmaster for salary, the court said,

> "The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except those of the President and the Judges of the Courts of the United States. The amount fixed at any one time may be added to or taken from at will. No officer except the President or a Judge of a Court of the United States can claim a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services, he may resign." (See also United States v. McDonald, 128 U. S. 471; 473; 32 Law. Ed. 506, 507).

The doctrine that office and compensation are separable clearly declared in the Embry case is applicable to those diplomatic offices created by the President pursuant to the delegation of authority contained in the Constitution. While it is recognized that Congress can place no limitation on that power to appoint diplomatic agents, the courts have held that the power to determine matters relating to their compensation belongs exclusively to the Congress.

In *Matthews* v. *United States*, 123 U. S. 182; 31 Law. Ed. 127, the court held that the Congress could reduce the salary of a consul by a reduction of appropriations, coupled with a declaration of its intention that the reduced amount should constitute full salary. Compare *United States* v. *Langston*, 118 U. S. 389, 394; 30 Law. Ed. 164, 165.

In *Byers* v. *United States*, 22 C. Cls. 63, the court declared,

> "It has been claimed by the executive, in accordance with the opinion of Attorney General Cushing, that by the Constitution to the executive alone is granted the power to appoint diplomatic agents of any rank or title, at any time, and at any place, and upon the exercise of this power Congress can place no extension or limitation, by undertaking either to create, abolish, or change

> the character, title, or rank of officers. On the other hand, to the legislative branch of the government alone is granted the power to provide for the compensation of these as well as of all other public officers, and this it may do in such manner as it deems best, or may withhold all compensation whenever it sees fit to do so."

Also pertinent is Wood's case, 107 U. S. 414; 27 Law. Ed. 542. In that case the court affirmed the view that officers on the retired list of the Army compose part of the Army and, therefore, no one can be upon that list who is not an officer appointed as required by Article II, Section 2 of the Constitution. The court further held however that Congress could change his rank and pay, holding that such changes would not affect the office.

It is well established, therefore, that compensation is not by reason of the Constitution an inseparable incident of office, and the power to appoint does not by reason of the Constitution include the power to compensate. The granting of compensation, except in regard to the President and the judges of the federal courts, is a matter completely within the constitutional control of the legislature which may exercise its power "in such manner as it deems best, or may withhold all compensation whenever it sees fit to do so." *Byers* v. *United States, supra.*

We submit that since the power to appoint and the power to compensate are separate and distinct, the Congress may act in regard to compensation without impinging on the executive authority; and since compensation is not a constitutional incident of office, the Constitution imposes no requirement that the power of Congress regarding compensation may be exercised only in regard to office.

An incumbent of any office or position, other than the Presidency or federal judgeship, acquires a right to unearned compensation at the sufferange of the legislature. The legislature may reduce or eliminate compensation, without affecting the existence of the office or position, and without disturbing the executive power of appointment and removal.

The Embry case, *supra*, recognized this principle by declaring that no incumbent of a legislatively-created office can claim a contract right to "any particular amount of unearned compensation" and "if an officer is not satisfied with what the law gives him for his services, he may resign." Also pertinent are the numerous other cases holding that Congress may reduce compensation of an office or position at any time, and incumbents may not claim a higher amount. *Matthews* v. *United States*, *supra*; *United States* v. *McDonald*, *supra*; *Mississippi ex rel Robertson* v. *Miller*, 276 U. S. 174, 72 Law. Ed. 517; *United States* v. *Mitchell*, 109 U. S. 146; *United States* v. *Fisher*, 109 U. S. 143; *Dodge* v. *Board of Education*, 302 U. S. 74, 78; 82 Law. Ed. 57, 62.

In the Dodge case, the court explained the controlling doctrine as follows:

> " . . . an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right."

Because a statute fixing compensation is in legal effect merely a declaration of policy by the legislature, it follows that the Congress may eliminate compensation at its discretion.

The Constitution does not compel the granting or maintenance of salary for any officer or employee of the government, other than the President and judges of the courts. The numerous decisions referred to above recognize that Congress has complete control over the subject of com-

pensation. And it is significant to note that in 1795, discussing the constitutional provision regarding compensation for the President, Alexander Hamilton wrote as follows:

> The manifest object of the provision is to guard the independence of the President from the legislative control of the United States or of any state, *by the ability to withhold*, lessen, or increase his compensation. (Hamilton's Works, edited by John C. Hamilton, Vol. VII, p. 538) (Italics supplied)

Implicit in that observation is recognition of the constitutional power of Congress to withhold salary from any officer or employee not deriving his compensation from the Constitution.

As a matter of fact, there are many thousands of government employees working without compensation. The "Monthly Report of Employment—Executive Branch of the Federal Government," published by the United States Civil Service Commission, reporting for January, 1945, states,

> . . . there were 311,000 uncompensated employees at the end of January . . .

The Commission explains that number included those employed "WOC" (presumably, "Without compensation") and those employed at one dollar per annum.

There remains for consideration the question whether the Congress in dealing with compensation must deal with offices and positions, or may deal in personam.

Analysis of this question best can be made by considering it in relation to the circumstances present in these cases.

As previously noted, the Federal Communications Commission appointed respondents Watson and Dodd pursuant to statutory authority "subject to the provisions of the civil service laws and sections 661 to 674 of Title 5, to appoint such other officers, engineers, accountants, inspectors, attorneys, examiners, and other employees as are necessary.

in the execution of its functions." USCA, Sec. 154(f). Its authority to compensate employees so appointed is contained in the further statutory provision that "the Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, . . .) as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress . . . ." 47 USCA, Sec. 154(g).

In accordance with the requirements of 47 USCA, Sec. 154(f), the positions created by the Federal Communications Commission, pursuant to the delegated authority to engage necessary personnel, and to which respondents were appointed, were classified under the Classification Act of 1923 (5 USCA, Secs. 661-674) and respondents were assigned rates of compensation as therein provided (5 USCA, Sec. 664).

Respondent Lovett was appointed by the Secretary of the Interior pursuant to statute empowering him to

> ". . . appoint such other executive and administrative officers as may, in his discretion, be required. Such officers shall have such powers and duties as may be conferred or imposed upon them by law or ordinance, or by order of the Secretary of the Interior or executive regulation of the Governor not inconsistent with any such law or ordinance. The salary of all executive officers and employees appointed by the President or by the Secretary of the Interior shall be paid from funds appropriated for the Government of the Virgin Islands by the Congress in annual appropriations bills, or as may be otherwise provided by law. The officers appointed by the Secretary of the Interior shall hold office during his pleasure, and in making such appointments the Secretary shall give due consideration to natives of the Virgin Islands." (48 USCA, Sec. 1405v).

His compensation was fixed pursuant to statutory provision authorizing the President to fix the compensation of such appointees. 48 USCA, Sec. 1391.

Therefore, all of the respondents occupied offices or positions created by the executive agencies pursuant to general statutory authority to engage necessary personnel. None occupied an office or position created directly by the legislature.

The rates of compensation to be received by all of the respondents were fixed by the executive agencies, in accordance with the functions and duties assigned them by these executive agencies. In the cases of respondents Watson and Dodd the Federal Communications Commission acted within the limits imposed by the Classification Act of 1923. In the case of respondent Lovett, rate of compensation was fixed at discretion of the President.

None of the respondents occupied an office or position to which Congress had directly affixed a specified compensation.

Each of the respondents received any right to compensation he possessed from the exercise of authority which Congress conferred upon the employing agencies to expend public moneys for necessary personal services. The Federal Communications Commission derived its power to compensate from the provision authorizing it to expend for personal services such sums as Congress might appropriate. 47 USCA, Sec. 154(g). The power of the Secretary of the Interior to compensate his appointees was limited by the provision that their compensation should be paid from particular moneys furnished by Congress. (48 USCA, Sec. 1405v)

Any other construction would nullify those specific provisions as to payment of compensation. If they should be construed as merely prohibiting actual expenditures, without limiting the power of the agencies to create an obligation for compensation, the effect would be to hold that the agencies without limit might create obligations to pay for personal services. To illustrate, assume that Congress appropriating money for the Federal Communications Commission should provide that each appointee shall receive

$2000, and appropriated a total amount of $1,000,000 for personal services. Under the construction that 47 USCA, Sec. 154(g) does not limit power to create an obligation to compensate, the Federal Communications Commission could employ 250 employees at $4000 per annum each, thus ignoring a plain intention of Congress to control compensation, and could commit the Congress either to make expenditures of public moneys contrary to its direction, or to repudiate valid obligations of the United States.

Again to illustrate, assume that Congress appropriating for the Federal Communications Commission should provide a total of $1,000,000 to be expended by the Commission for the purposes specified in 47 USCA Sec. 154(g). Under the construction made by the Court of Claims, the Commission could appoint any number of persons it saw fit and create a total obligation for salaries far in excess of the $1,000,000 appropriated. Thus, it could commit the Congress either to expend far greater amounts than the Congress deemed necessary or to repudiate valid obligations of the United States. This is exactly the result the Anti-Deficiency Act was intended to prevent.

Such a construction, therefore, would negate the clear purpose of 47 USCA Sec. 154(g) and 48 USCA Sec. 1405v, which, we submit, is to limit the delegated compensating power granted the executive agencies. In other words, under the statutes controlling in these cases the power to expend was an indispensable element of the power to compensate. And the power to spend, in turn, was dependent on congressional appropriations.

We are not here concerned with a situation in which claimants occupied statutorily-created offices to which Congress appended a specified salary. Under such circumstances, a mere failure to appropriate does not affect the right of an incumbent to the designated salary. See *United States* v. *Langston*, 118 U. S. 389, 30 Law. Ed. 164; *United States* v. *Vulte*, 233 U. S. 509, 58 Law. Ed. 1071.

We are here dealing with situations in which a failure to appropriate would prevent the executive agencies

from creating any future obligation to compensate appointees in the categories in which respondents were appointed. The power to compensate was delegated in the power to expend conferred upon the agencies, and expressly limited by the statutory provisions that they might expend for such purposes only the sums provided by Congress.

Where Congress delegates the power to disburse public funds, it may revoke or curtail that authority by asserting its control over appropriations.

Dickerson v. *United States*, 310 U. S. 554, 555; 84 Law. Ed. 1356, 1359, involved a claim for an enlistment allowance under section 9 of the Act of June 10, 1922 (10 USCA, Sec. 633). In 1938, Congress appended to the appropriation for the Rural Electrification Administration a provision that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment of reenlistment allowances for reenlistments during the fiscal year ending June 30, 1939. Since claimant had reenlisted on July 22, 1938, the court held the claim defeated, the limitation in the Appropriation Act operating as an amendment to the former law.

In *Dunwoody* v. *United States*, 143 U. S. 578, 586; 36 Law. Ed. 269, 272, claimant sued to recover compensation for services rendered as a member and clerk of the National Board of Health, created in 1879. Affirming a judgment of the Court of Claims dismissing his claim, the court said:

> "These enactments evince the purpose upon the part of Congress not to create any liability upon the part of the United States, in respect to the work of the National Board of Health, beyond the amounts specifically appropriated by it from time to time for that work. This purpose, if not clearly indicated by the Act of 1879 establishing the board, became manifest before the plaintiff rendered the services for which, in this action, he claims compensation, not upon implied contract. If the plaintiff is equitably entitled to be paid for any of the services in question rendered by him as a member of the board, and if the special appropriation made for the salaries and expenses of its officers and employes

> have been exhausted, his appeal must be made to Congress. Looking at all the acts of Congress passed before he became a member of the board, it is clear that he did not perform services as such member under any implied contract that he should be compensated otherwise than out of the money specially appropriated to meet the expenses incurred by the board in the performance of the duties imposed upon it. In other words, that board has no authority to incur any liability upon the part of the government for salaries or other expenses in excess of the amounts appropriated by Congress for such purposes.
>
> These views dispose of the case, adversely to the plaintiff, as to his claim for compensation as a member of the board. There is still less ground for a judgment in his favor in respect to services rendered as chief clerk, disbursing agent, and secretary. Congress never intended to incur liability for such services beyond the sums appropriated from time to time for the work of the board of health."

In these cases the Federal Communications Commission and the Secretary of Interior derived their power to compensate from delegated authority to expend federal funds, and since it is established that Congress may curtail such authority by control over appropriations, the question whether Congress could by Section 304 prevent the creation of an obligation to pay respondents for personal services after November 15, 1943, resolves itself into the question whether Congress could limit the *use* of appropriated moneys as it did in Section 304. If the limitation on expenditures there imposed was valid, then the expending power of the executive agencies was correspondingly curtailed and they possessed no authority to create an obligation to pay the respective respondents for services performed after that date. Obviously Congress did not intend to prevent payment to respondents and leave authority to obligate the Government for such payment.

We have demonstrated elsewhere that under Article I, Section 9, Clause 7 of the Constitution, Congress

possesses plenary power to direct and control the expenditure of public funds. There is nothing in the Constitution to prevent the legislature from designating the persons who shall receive and who shall not receive public moneys. Congress exercises absolute control over the public moneys.

We submit that exercising the power it expressly retained by 47 USCA, Sec. 154(g) and by 48 USCA Sec. 1405v, to direct and control the expenditures of the Federal Communications Commission and the Secretary of the Interior, Congress could have required those agencies to furnish lists of their appointees, and could have appropriated the compensation to be paid each of them by name. Thus, by utilizing specific appropriations, Congress could determine the amount of compensation to which each appointee might become entitled, and by refusal to appropriate for any named individual could prevent him from securing any right to compensation for future services.

There is nothing in the Constitution which prohibits the legislature from so exercising its acknowledged power over compensation and over the expenditure of public funds; but the size and complexity of modern government makes that method impractical, and necessitates use of lump-sum appropriations.

However, when Congress utilizes lump-sum appropriations as it did in these cases, and specifies the persons to whom none of the money may be paid, it asserts exactly the same constitutional power to direct and control expenditures. We submit, therefore, that Section 304, which was a valid limitation on the use of appropriated money, prevented the Federal Communications Commission and the Secretary of the Interior from granting the respective respondents any right to compensation for services performed after November 15, 1943, and that there was no legal obligation of the Government to pay any compensation for such period. Hence, Section 304 could not properly be held to have destroyed or repudiated an existing legal obligation, and judgment below should have been for the United States.

Section 304 Did Not Terminate Respondents' Services.

The Court of Claims found as a matter of fact and held as a conclusion of law that respondents' *services* were not terminated by the Congress in enacting Section 304.[1]

In its findings of fact, based upon stipulations signed by each of the parties, the court determined that respondent Watson *resigned* not because of Section 304, but for the reason that, "The reduction in appropriations for the Foreign Broadcast Intelligence Service makes necessary the elimination of the Analysis Division . . ." (R. 24)

The court's finding of fact also contains a communication from respondent Watson's executive superior, advising that because of the reduction in funds the position held by Watson, "has been eliminated," and that his "resignation coming in this way makes it very clear cut that the act is voluntary." (R. 25)

Respondent Dodd continued as an employee on the rolls of the Federal Communications Commission through November 21, 1943, and like Watson, he resigned not because of Section 304, but because his position in the same division was abolished by his executive superiors in line with a reduction in appropriations for the Foreign Broadcast Intelligence Service.

Respondent Lovett was not removed by Section 304. He resigned at the request of the Secretary of the Interior,

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[1] The separate concurring views of Judges Whitaker and Jones do not hold that by Section 304 Congress removed respondents from their positions. Judge Whitaker found "it unnecessary to consider . . . whether it amounted to a removal of these men from office." (R. 42)

Judge Jones makes no objection to Section 304 on the ground that it removed respondents from the positions they held and said that he would have no doubt as to its constitutionality "If Section 304 merely forbade the use of funds in the bill, or other funds already available in other bills . . ." Judge Jones' objections are apparently based upon the erroneous view that Section 304 prospectively denies each of the respondents a constitutional right "to apply for any position within the Government and to have his application considered on its merits".

after continuing in his position without compensation for approximately four months after the President's failure to appoint him under Section 304.

Aside from the above findings of fact, the court held as a matter of law that:

> "It [Section 304] did not terminate plaintiffs' services." (R. 36)
>
> "As special counsel contend, Congress did not remove from office." (R. 37)

Elsewhere throughout its opinion, the court said:

> "The statute did not separate the plaintiffs from office . . . The plaintiffs were appointed lawfully, they continued in office lawfully." (R. 40)
>
> "There is nothing in Section 304 which disturbed plaintiffs' incumbency in office." (R. 36)

The court further stated:

> "It may be repeated that here we have . . . solely a claim for the as yet unpaid salary of an office, the duties of which have been performed by the undisputed holders of that office. These are not suits for reinstatement to office." (R. 37)
>
> "There was no removal of the officer from the office . . ." (R. 37)
>
> "The obvious circumstance that the section was dealing with was one where the plaintiffs were legally and actually in office. Section 304 did not remove them. • • • The statute allowed these plaintiffs to continue in office. • • • In other words, as special counsel observe, the section did not remove them from office."

Respondents in the lower court recognized that "literally, of course, it is not a removal of the plaintiffs from the posi-

tions which they held. The positions remained unaffected, and plaintiffs continued for a time in those positions, carrying on the work which they had been appointed to do. But the section varies from an outright removal only because it is framed in the language of a refusal of appropriations."

The Implied Executive Power to Remove Certain Officers was not Infringed by Section 304.

If respondents were not removed, the power of removal is not here involved. However, since the petitioner has raised the question, the following observations seem appropriate.

The Solicitor General and the respondents admit that the Constitution does not grant any express executive power of removal. Even the executive power of *appointment* granted by the Constitution is confined by that instrument to

> "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers* of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" (Article II, Section 2)

This authority to appoint does not extend beyond "Officers of the United States," and it is modified by the power of the Senate to refuse concurrence. The same section provides that:

> "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments" (Article II, Section 2)

The Attorney General admitted in the court below that Respondent Lovett, whose appointment was vested by Congress in the Secretary of Interior, was, at most, an

"inferior Officer" within the meaning of the Constitution. Respondents Watson and Dodd were employees whose appointments were vested by Congress in the Federal Communications Commission. Their positions were clearly and solely creatures of the legislature.

Assuming that an exclusive power to remove respondents is implied by the general executive power of the President,[18] these cases would then present a conflict between the claimed *implied* executive power to remove inferior officers, or employees, and the plenary legislative power to control the expenditure of public funds under Article I, Section 9,[19] and Article I, Section 8,[20] of the Constitution. This Court is asked to set aside the exercise of an express power in favor of a claimed implied power.

The position of the Congress is further supported by Article I, Section 8, which, having granted the exclusive power to control expenditure of public funds, further authorizes the legislative branch

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"

It is important to understand at the outset what Sec. 304 provided and what it did not provide. It provided that after November 15, 1943, no public moneys were to be available to pay any part of the salaries of the three named individuals if prior to November 15, 1943, they had not been appointed by the President, by and with the advice and consent of the Senate.

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[18] Respondents stated before the Court of Claims that the *Myers* case, 272 U. S. 52, had no application here, although they cite certain dicta therein.

[19] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

[20] "The Congress shall have Power . . . to pay the Debts . . . of the United States." We note, in passing, that this section does not require Congress to *delegate* authority to pay obligations of the government; it provides that Congress *itself* "shall have Power . . . to pay the Debts . . . of the United States."

This placed no compulsion upon the Executive. He was free to appoint in accordance with the statute, or he was free to do nothing whatever under the statute. The Congress said to him in effect: "'If you elect to appoint in accordance with Sec. 304, and the Senate elects to advise and consent, the funds will be available. If you decide to do nothing, the funds will not be available."

The President in fact elected to do nothing under the statute. The determination of the Congress to withhold the funds thereupon became effective after November 15, 1943.

It has been suggested by respondents that:

> "The President, believing that the rider was unconstitutional, and not binding upon him, took no action under it. Presidential appointments of Messrs. Lovett, Watson and Dodd under the proviso in Section 304 would have been wholly inconsistent with the President's belief that the law *was ineffective for any purpose*." (Italics supplied)

Since the President did not elect to make the appointments, it is immaterial from a legal standpoint what motives may have prompted him. Respondents' interpretation of his state of mind, however, is negatived completely by the fact that the executive agencies *treated Section 304 as fully effective* after November 15, 1943, by recognizing that the withholding of funds was operative, and by failing to certify respondents' salaries after that date for payment.

Section 304 provided that no funds should be available to pay the salaries of these three persons after November 15, 1943, if prior to that date they had not been appointed by the President, by and with the advice and consent of the Senate. The President took no action under Section 304 prior to November 15, 1943. He has not undertaken

to appoint either of plaintiffs since November 15, 1943. The injury claimed by them in the present suits does not flow from the fact that he *could* not appoint after November 15, 1943, even if that were conceded, but from the fact that he *did* not appoint prior to November 15, 1943.

Because of Section 304 *and the fact that the President did not appoint thereunder*, there were no appropriations available to pay respondents after November 15, 1943.

The Act under inquiry did not constitute an unconstitutional infringement upon the prerogatives of the Executive with respect to removal of public officers or employees.

It is well to bear in mind that this was not a legislative removal; that it did not affect "the office" as distinguished from "the salary;" and that in fact respondents were not removed by the Executive, either as a result of the statute, or otherwise. (R. 24, 29, 32)

If it be insisted that the Act, although not constituting or effecting a removal, is nevertheless invalid as requiring the President to exercise his constitutional function of appointing by putting a time limit upon him, the answer is simply this: The statute did not require the President to do anything. It did not require the President to appoint by November 15th, or by any other date, or at all. It merely informed the executive department of the Government that it was not to pay out any funds to the persons named in the statute or obligate the Government therefor if the condition laid down in the statute was not met. The alternatives which the President had were to appoint in accordance with the statute, in which case funds would be available for salaries, or to do nothing, in which event no obligation could be incurred and no funds available for respondent.[21]

[21] Ewing v. United States, 35 C. Cl. 374, 286—" . . . where a claim is by statute made to depend upon the previous action of an executive officer no right vests until that officer has acted." cf. McLean v. United States, 95 U. S. 750; Birdsong v. United States, 34 C. Cl. 437.

Respondents stated in the court below:

> "The instant case in no way involves the issue decided in the Myers case[22] as to the power of Congress to limit executive removals."

Notwithstanding this admission as to inapplicability of the doctrine of the *Myers* case to the present case, respondents devoted a large part of their argument below to a discussion of the Myers decision, and to asserting the right of the Executive to remove Federal officers. The Attorney General likewise devoted a large portion of his argument to the same proposition.

We do not think it necessary, in view of the fact that plaintiffs were not removed, *at all*, to argue at length the question of where the power of removal resides. We accept for present purposes the complete authority of the Myers case, as far as it decided the question therein presented. It is recognized by all who have studied that decision that it leaves unanswered many questions as to the removal of minor employees.

The broad sweep of the Court's language in the Myers case has been widely criticized. The Supreme Court itself, in *Humphrey's Executor (Rathbun)* v. *United States*, 295 U. S. 602, 626-628, has interpreted the Myers decision as follows:

> "Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate, as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved, and therefore, do not come within the rule of stare decisis.

[22] Myers v. United States, 272 U. S. 52.

In so far as they are out of harmony with the views here set forth, these expressions are disapproved.

* * * * * * * * *

"The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the execut e department and hence inherently subject to the exclusive and illimitable power of removal by the chief executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive *officers*. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." (Italics supplied)

From this it will be noted that the Myers decision is limited to removal of "purely executive officers" and does not deal with those who exercise "no part of the executive power vested by the Constitution in the President." It does not deal with the removal of civil service employees generally, nor deny the possibility that Congress may have a voice in their removal. Certainly Congress has throughout our history made numerous and detailed provisions with respect to removal of such employees.[23]

In any event, the Myers case, and the later case of *Humphrey's Executor* v. *United States*, dealt with situations in which Congress had endeavored to limit the President's power of removal. In section 304 Congress merely withheld funds for salaries; it left the President entirely free to exercise his right of removal, without Congressional interference. He could have removed respond-

[23] For an elaborate resumé of such provisions, see the dissenting opinion of Mr. Justice Brandeis in the Myers Case, which Mr. Justice Frankfurter has described as an example of "critical rigor."

ents the next day, so far as Section 304 was concerned. Respondents do not claim that any vested legal rights would have been impaired by Executive removal on November 15, 1943, or that such removal would have denied them due process. This illustrates that the issue herein is primarily political, that is, it involves primarily questions of jurisdiction as between the Executive and Legislative departments of the Government rather than questions between the Government and the respondents.

Both the Myers and Humphrey cases involved actual removals from office by the Executive. The present case does not involve removal by anyone.

Neither the Myers nor the Humphrey case involved an exercise of the power of Congress over public funds. The present case does.

Even if the refusal of Congress to appropriate might be said to affect incidentally the continuance of respondents in office because they are unable or unwilling to continue without compensation, the injury to them is at most a consequential injury from the exercise of public authority, and presents no justiciable controversy to the courts.

There would be a wide distinction between a statute which had such an incidental effect, leaving the Executive entirely free to exercise his power of removal, and one such as that in the Myers case, which required the President to keep someone he felt could not aid him in the discharge of his duties. Furthermore, although it is agreed that no removal took place, if it can be said, as respondents argue, that that was the necessary and inevitable result, it must be borne in mind that the result flowed not merely from the action of Congress, but from the President's approval of the Act and his failure to appoint thereunder.

If Section 304 can be said to impose any restriction whatever on the President, it was not a restriction upon his implied right of removal, but upon his right to perpetuate respondents on the Federal *payroll*. The Section dealt with salaries, not offices. The contention that the two are

inseparable has no support in the Constitution or in judicial precedents.[24]

(a) *The Claim That Impeachment Was Necessary.*

Respondents have argued that the only means by which Congress is authorized by the Constitution to deal with the situation here involved is by impeachment. They cite Article I, Section 2, Clause 5—

> "The House of Representatives * * * shall have the sole Power of Impeachment."

They also cite Article II, Section 4—

> "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

While it is clear that the Court below was correct in holding that respondents were not removed, we comment briefly on the history and purpose of these provisions. The former provision clearly means that no branch or agency of Government *other* than the House of Representatives shall have the power of impeachment. The latter provision clearly means that civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

The proceedings before the Kerr subcommittee were not in any sense criminal proceedings. The Court below held that they were not an attempted exercise of judicial power (R. 39). They were a legislative investigation into a subject matter over which Congress clearly has authority.

Respondents were not accused of "treason, bribery, or other high crimes and misdemeanors." The resulting legislation (Sec. 304) was not retroactive in application. It

[24] Cf. Embrey v. United States, 100 U. S. 680.

did not undertake to punish respondents for past conduct, either in or out of public office or employment. It was not to become effective until a future date, and then only if the condition therein contained was not met. It was a fiscal measure, controlling the expenditure of public funds, was not a "rider"[25] to an appropriation act, but a relevant proviso, germane to the remainder of the Act.

House Resolution 105, authorizing the Kerr subcommittee to investigate the subject matter, did not purport to authorize the subcommittee to impose any penalties of any kind upon respondents. The sole functions of the subcommittee were to investigate, to report, and to recommend any appropriate legislation.

The Congress was not asserting a power of removal from office. It was asserting a power over the emoluments of office. When the House has desired to express itself with respect to "removals" it has never been wanting in language to express that desire. See, for instance, Sec. 2 of the Ramspeck Act (an Act extending the classified executive civil service of the United States), 54 Stat. 1212, (1940) reading in part as follows:

> "That any such incumbent who fails to pass the non-competitive examination provided in his case *shall be separated from the service* not later than six months after the Commission advises the appointing officer that such employee has failed." (Italics supplied)

Also, see Section 9A of the Hatch Act (Act of August 2, 1939, 53 Stat. 1148, 1149), and Section 8 of the original Civil Service Act of 1883 (22 Stat. 406).

Of Hatch Act, sec. 9A, the U. S. Civil Service Commission says in its annual report for 1944:

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[25] "* * * in legislative practice, an additional clause, relating to a matter entirely distinct from that of the bill itself, annexed to a bill while in course of passage." (Webster) cf. *Tolerton* v. *Gordon*, 236 Mo. 142, in the course of which the Court said the proviso there under consideration was not a rider.

> "When a Federal employee is found by the Civil Service Commission to have violated the Hatch Act, the Commission *is required by the law to direct his removal.*"

It may also be worthy of note that the process of Impeachment has never heretofore been thought to apply in cases of minor employees of the Government, either here or in England. Article II, Section 4, of the Constitution, refers to the President, Vice President, and all civil officers. Whether any of respondents are officers in a constitutional sense, and within the term "civil officers," is very doubtful.

During the entire history of our Government the Senate has held only twelve impeachment trials. These involved one President of the United States, one Associate Justice of the Supreme Court, a member of the Cabinet, eight judges of Federal Courts, and one U. S. Senator.

The history of impeachment proceedings in England also bears out the view that it is an appropriate measure only in those cases where the offender is one of high office, whose political influence makes him amenable only to some extraordinary judicial proceeding.[26]

And see Story:

> "The object of prosecutions of this sort in both countries is to reach high and potent offenders, such as might be presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the imperfect organization and powers of those tribunals."[27] (p. 513; Sec. 688)

To the same effect see Dwight, "Trial by Impeachment" p. 263:

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[26] For an exhaustive treatise on English and American Impeachment Trials, see Alex. Simpson, "A Treatise on Federal Impeachments," (1916).

[27] Citing, 4 Black. Comm. 260; Rawle on the Constitution, ch. 22, p. 210, 211; 2 Wooddeson's Lect. 40, p. 596, etc.

"It may be asked, why, then, is the cumbrous process of impeachment ever resorted to? The answer is, that there were often found in England persons who could not readily be tried by the common law courts, either owing to an influence which overshadowed the ordinary tribunals, or because technical rules of practice made the usual remedies scarcely worth pursuing."

Since in any event Congress was not undertaking by Sec. 304 to remove respondents, but was content to exercise its undoubted power over the purse, it was under no compulsion to resort to impeachment proceedings, and to have done so in the present instance would have been wholly inappropriate.

(b) *The Condition in Section 304.*

Section 304 provided that no money should be available to pay any one of the respondents after the specified future date

"unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate . . ."

Respondents alleged in the lower Court that:

"Section 304 of the Urgent Deficiency Appropriation Act, 1943, is an unconstitutional invasion of the executive power of the President of the United States under Article II of the Constitution of the United States, because the permanent bar to compensation from federal appropriations of any kind after November 15, 1943, except upon fulfillment of conditions imposed by Section 304, is an attempt by the Congress of the United States to effect legislative removal of plaintiff and to deprive him permanently of his status as a federal officer. *The attempt by Section 304 to condition plaintiff's right to continued compensation on reappointment by the President with the approval of the Senate by November 15, 1943, is likewise an unconstitutional encroachment on the executive power of the President of the United*

States to appoint and remove executive officers, and does not in any way remove the taint of unconstitutionality from Section 304. Impeachment is the sole means by which the Congress may lawfully remove an officer of the federal government. (R. 10) (Italics supplied)

The tenor of respondents argument is as follows:

"When we assume, as we must, that the removal of plaintiffs by legislative action is an unconstitutional interference with the executive department, there is no essential difference presented by a provision which makes the removal conditioned upon further action by the President and the Senate."

"Here, however, Congress asserts that it may initiate removals, and make that initiation effective unless the President and the Senate affirmatively step in to prevent it."

The respondents do not contend that it was without the power of Congress to authorize the appointment of the plaintiffs in the prescribed manner. Their argument is that even if that be within the constitutional power of the legislature, its assertion in these cases cannot save Section 304 because the provision was a legislative removal, void whether absolute or conditional.[28]

As we have demonstrated herein, a refusal to pay does not remove from office. The condition in Section 304, therefore, was not a condition precedent, the performance of which was necessary to prevent a legislative *removal*—it was a condition precedent to the use of public moneys with which to pay compensation to the employees. By enacting it Congress did not declare to the executive that unless it should appoint respondents in the manner prescribed the Congress would remove respondents. It merely declared that if he should not appoint them as prescribed no money could be withdrawn from the public Treasury with which

[28] The Attorney General proceeds on the same "removal" theory and does not argue the effects of the condition.

to pay them. No removal resulted from the executive's failure to perform.[29]

While respondents do not argue that the condition infringed upon the executive power to appoint officers, two points might be noted in that connection. First, Section 304 did not compel the President to exercise his power of appointment; and, secondly, the power to appoint and the power to pay are separate powers vested in separate branches of the Government.

Collins v. *United States*, 14 Ct. Cl. 569, involved the validity of a statute authorizing the President

> " . . . to reinstate Major Joseph B. Collins, late of the United States Army, and to retire him in that grade, as of the date he was previously mustered out . . . " (20 Stat. at L., 484, March 3, 1879.)

As stated by the Court, the issues were:

> "First, whether by the terms of the Act Congress intended to confer upon the President alone authority to reinstate the claimant; and, second, whether it had the Constitutional power so to do." 14 Ct. Cl. 570.

The statute was held to be constitutional. In its opinion, the Court referred to a long list of statutes in which the Congress had authorized the President alone to appoint *named* individuals to offices in the Army, and also referred to a number of statutes authorizing the President, by and with the advice and consent of the Senate, to appoint *named* persons to offices in the Army. The Collins case, therefore, sustained the proposition that the Congress may authorize the appointment of specified persons in a designated manner; and by its references the Court recognized that the legislature may authorize the appointment of various individuals to the same office by different methods.

[29] The condition placed in section 304 did not indicate Congressional acceptance of plaintiffs' fitness. Congress made a prima facie finding of unfitness, expressing its willingness to have the matter further examined as provided in the condition.

In Section 304, the Congress went no further than to authorize the President to appoint named persons to office. It did not attempt to order him to appoint them; and his failure to appoint them as prescribed was not attended by any diminution of executive power. The executive power to appoint was in no degree infringed by the fact that failure to appoint as prescribed resulted in a legislative refusal to compensate employees otherwise appointed.

In 7 Op. At. Gen. 215, the Attorney General had before him an act of Congress providing that:

> " . . . the President shall appoint no other than citizens of the United States, who are residents thereof, or abroad in the employment of the government at the time of their appointment . . . "

He ruled that the statute, which purported to control the executive in the matter of appointing diplomatic officers must be deemed merely directory or recommendatory, stating:

> "The limit of the range of selection for the appointment of constitutional officers depends on the Constitution. Congress may refuse to make appropriations to pay a person unless appointed from this or that category, but the President may, in my judgment, employ him, if the public interest requires it . . . "

The Court of Claims also has drawn the distinction between appointment and compensation, pointing out that while the Congress can place no limitation on the Presidential power to appoint diplomatic agents, the power to determine matters relating to their compensation is vested exclusively in the legislature. *Foote* v. *United States*, 23 Ct. Cl. 443; *Byers* v. *United States*, 22 Ct. Cl. 59.[30]

The refusal by the legislature to exercise its exclusive power to provide funds with which to pay plaintiffs unless the President chose to act in the designated manner can-

[30] Also see *infra*, pp. 29-38, distinguishing between compensation and office.

not be construed as an unconstitutional coercion of the executive or an encroachment upon his powers with respect to appointments.

But it also is argued that the purpose of Section 304 was to starve the respondents out of office, and thereby to bring about a removal, and it is claimed that Congress has no authority to so use its power over appropriations and disbursements. This argument requires an examination of the power of Congress over public funds, discussed herein at p. 67.

The Attorney General argued that

> "if Section 304 were construed as permitting plaintiffs to remain in office without pay, it would amount to a partial repeal of the statutory prohibition against accepting voluntary service for the Government (34 Stat. 48, Title 31, U. S. C., sec. 665)," and that Congress did not intend this.

The statute referred to, insofar as pertinent, reads as follows:

> ". . . Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property (23 Stat. 17, May 1, 1884; sec. 3679, R. S.; as amended by 33 Stat. 1257, Mar. 3, 1905, and 34 Stat. 49, Feb. 27, 1906; U. S. C., Title 31, Sec. 665)."

The Attorney General argued in substance, that the court should not construe Section 304 as effecting a "partial repeal" of the statute relating to voluntary services, which is undoubtedly within the power of Congress, but that the court should construe the section as a legislative removal from office or employment, which he contends is not within the power of Congress, and that Section 304, so construed, must be held unconstitutional.

For the purpose of argument, let us assume for a moment that Section 304 were construed as creating excep-

tions to the statute with reference to voluntary services. Would the result be disastrous? Would it be fraught with dangers equal to those which might flow if—for the first time in our history—the courts should invalidate an act of Congress passed in the exercise of the power over the public purse? Obviously not.

We think it clear that "*voluntary service*," as the term is used in 34 Stat. 48, is not synonymous with "*uncompensated service*." This has been the interpretation of the statute since its inception, as recourse to an able and exhaustive opinion of Attorney General Wickersham readily discloses.[31]

To sustain their contention that compensation and office are indivisible and that refusal to provide compensation is legislative removal, the principal authority cited by the respondents in the Court below was *State ex rel Tolerton v. Gordon*, 236 Mo. 142. In addition thereto, the Attorney General emphasized two other state court decisions: *Reid v. Smoulter*, 128 Pa. State 324, and *Cotten v. Ellis*, 52 N. C. 545.

While none of those cases is analogous on the facts to the present claim, insofar as they declare the doctrine that refusal to provide compensation is removal they are contrary to Federal rulings on the subject. *United States v. Mitchell*, 109 U. S. 146, 150.

In only two instances does the Constitution provide that officers of the Government shall be compensated for services rendered the United States.[32] With regard to the Executive, it provides that

> "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be in-

[31] 30 Op. At. Gen. 51.

[32] The Constitution also provides "The Senators and Representatives shall receive a Compensation for their Services to be ascertained by law, and paid out of the Treasury of the United States." (Art. I, Sec. 6)

creased nor diminished during the Period for which he shall have been elected . . ."[33]

With regard to the judiciary, it provides that

> "The Judges, both of the supreme and inferior Courts . . . shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[34]

It is not without significance that the Constitution includes specific mention of Ambassadors, Ministers, Consuls, Heads of Departments, and the Vice President, but *nowhere* suggests that they shall "receive, for their Services, a Compensation." In the instance of these latter constitutional officers, the matter of compensation, if any, is left to the discretion and judgment of the Congress. Surely it cannot be said that the compensation of *statutory* officers and mere employees is any less within the exclusive dominion and control of the Congress or is *required* by the fundamental law of our Government.

Thus, the Chief Executive and the judges were themselves made independent of the Congress in matters of compensation while the great branches of Government over which they preside were purposely made dependent in this respect. None of the three great branches of government was meant to be completely independent of the others.

But the President's constitutional power and prerogative of appointment is not dependent upon his appointees' being compensated. The President retains the power to appoint certain officers, even though they will receive little or no compensation for services rendered. Unquestionably the President's ability and right to appoint is independent of the power of Congress to authorize and determine the amount of compensation, even though Congress sometimes

> " * * * embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous." (16 Op. At. Gen. 522)

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[33] Constitution of the United States, Art. II, Sec. 1, Cl. 7.

[34] Idem, Art. III, Sec. 1.

In passing, it may be noted that if the Attorney General's position in the Court below were correct and, respondents were not permitted under 34 Stat. 48, to work without compensation, the arrangement by which respondents were required, or suffered, or permitted to work after November 15, 1943, (to paraphrase the Fair Labor Standards Act) when no appropriation was available with which to pay them would be a violation of law by their executive superiors and require *their* summary removal from office.

The prohibition against voluntary services appeared in Section 3 of the Act of February 27, 1906, 34 Stat. 48, 49. This superseded a similar provision contained in the Act of May 1, 1884, c. 37, 23, Stat. 17[35] and amended the Act of July 12, 1870, c. 250, Sec. 7, 16 Stat, 251 by adding the limitation *supra* to others designed to prevent expenditures in excess of appropriations and to necessitate the apportionment of appropriations for contingent expenses over the period for which such funds are made available.[36]

All the provisions of 34 Stat. 48, including that quoted above, are mandatory; and to this end the statute also provides that

> ". . . Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than $100 or by imprisonment for not less than one month."

This statute has been construed many times, and the authorities have concluded uniformly that it was not meant

[35] The text of the act is as follows: "To enable the Secretary of the Interior to pay the employees temporarily employed and rendering service in the Indian Office from January first up to July first, eighteen hundred and eighty-four, two thousand one hundred dollars, and hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personnel in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property."

[36] Where appropriations are inadequate or non-existent, statutes forbid purchase contracts (34 Stat. 255), construction contracts (R. S. 3733), and rental agreements (19 Stat. 370).

to prohibit services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be non-salaried. Attorney General George W. Wickersham, in an opinion to the Secretary of the Interior, February 7, 1913, had occasion to examine the statute and its legislative history. (30 Op. At. Gen. 51) His opinion, which has never been overruled or modified, is, in pertinent part, as follows:

> "It seems plain that the words 'voluntary service' were not intended to be synonymous with "gratuitous service' and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be non-salaried. In their ordinary and normal meaning these words refer to service intruded by a private person as a 'volunteer' and not rendered pursuant to any prior contract or obligation, and they were exactly so construed (though not as a part of this statute) in Board of Commissioners v. Richardson (54 Ind. 153, 156). An incidental *dictum* of Mr. Justice Field in his separate concurring opinion in United States v. San Jacinto Tin Co. (125 U. S. 273, 305) may in some of its language be construed to indicate a view that Congress intended 'voluntary service' to be synonymous with 'gratuitous service,' but his language was explicitly addressed to 'the practice of obtaining services from *private parties* without incurring liabilities for them' It would be stretching the language a good deal to extend it so far as to prohibit *official* services without compensation in those instances in which Congress has not required even a minimum salary for the office.
>
> "Taking the section as a whole, it is also perfectly evident from its legislative history that *the purpose was to prevent the Departments from incurring financial obligations over and above those authorized in advance by Congress.* In its original form it did not contain the words I have italicized in the text as quoted above, but merely prohibited—
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> "*Thus it is evident that the evil at which Congress was aiming was not appointment or employment for*

authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. The latter class of case has been held to be within the act. (Lee v. United States, 45 Ct. Cl. 57).

"Having regard, therefore, to the particular language used and to the purpose as disclosed also by the legislative history, I am of opinion that Revised Statutes, section 3679, does not prohibit the appointment of a person to an official position, *even though it be a condition of the appointment that the service is to be without compensation.*

"Of course, I do not mean by anything I have said herein to intimate that persons may be appointed without compensation to any position to which Congress has by law attached compensation. (Glavey v. United States, 182 U. S. 595; Miller v. United States, 103 Fed. 413). *The position of superintendent of Indian schools, however, is one of those appropriated for in general lumpsums* (37 Stat. 518 passim; 35 Stat. 73; 34 Stat. 1020) *and to which, therefore, persons may be appointed either without compensation or with any compensation short of the maximum.*" (Italics supplied)

The foregoing opinion of Attorney General Wickersham is sufficient authority for the proposition that plaintiffs could have remained in office without compensation, and, further, that the *appointing power* is not dependent upon provision for the compensation of the person appointed, although the power to appoint may not be used as a device to pledge the assets of the United States or to create a debt binding upon the government when Congress has decided otherwise. There is much additional authority, all of which is in harmony with the opinion above.

Thus, in 1925, Attorney General John G. Sargent stated in an opinion.[37]

"I am not unmindful of the statutory provisions which prohibit the employment of officers, clerks, or other employees in the executive departments or bureaus

[37] 34 Op. At. Gen. 490, 496.

> when such employment has not been authorized and appropriation made therefor. Their purpose, however, is to prevent the unauthorized employment of persons who, after rendering services, will make claims for compensation. * * * I have the honor, therefore, to advise you that, in my opinion, the Chief of the Bureau of Efficiency may be appointed a member of the Board of Actuaries provided for by section 16 of the Retirement Act, approved May 22, 1920, supra, to serve on said board without compensation in addition to that provided by law for the position now held by him, and such appointment, if made, will not be in violation of any statute."

Needless to say, the person thus appointed would be nonetheless an officer because uncompensated; nor would his acts be any the less binding or official because unrequited.

In another recent decision[38] the Comptroller General once more considered 34 Stat. 48, prohibiting voluntary services, and stated in his opinion:

> "There has been considerable misunderstanding regarding the proper application of that statutory provision—the practice having been adopted, it seems, of authorizing the payment of salary at the rate of $1 per anum in order to prevent a violation of said statute. Such a practice is unnecessary unless some other statute or appropriation act *requires* the payment of $1 per annum." (Italics in the original)

The relationship between appropriation laws of Congress and the President's power of appointment has been the occasion of serious investigation and careful opinion. Thus, in 1843, Attorney General John Nelson stated:[39]

> "The power of appointment results from the obligation of the executive department of the government 'to take care that the laws be faithfully executed;' an obligation imposed by the Constitution, and from the authority of which no mere act of legislation can operate a dispensation. Congress may, however, indirectly

[38] 23 Comp. Gen. 900, 903.

[39] 4 Op. At. Gen. 248.

limit the exercise of this power by *refusing appropriations to sustain it*, and thus paralyze a function which it is not competent to destroy. This would seem to be the purpose of the act of the 26th August, 1842, which may be regarded as an exposition of the legislative will, and to which, except in cases of commanding exigency, I think the executive action should be conformed; for, whilst it is quite clear that *the power of appointment is unimpaired* by the acts of Congress referred to, it is equally obvious that the intention of those by whom they were passed was to discountenance its ordinary execution.

"The terms of the Act of August, 1842, are free from all ambiguity. They unqualifiedly prohibit any payments to agents or commissioners, thereafter to be appointed, except out of specific appropriations to be made by law. In all cases, however, even in those of the most pressing urgency, in which the executive departments of the government might feel that the best interests of the country called for the exercise of the appointing power, *a resort to Congress for the means of compensating the appointees would be indispensable*. The authority to requite the services of officers so appointed cannot be safely implied from the general terms of an appropriation law, *which should always be interpreted in subordination to the limitations imposed by existing and qualifying enactments*." (Italics supplied)

In this connection, another statute is worthy of particular note. It provided as follows:

> "No money shall be paid from the Treasury as salary to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate.[40]

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[40] R. S. Sec. 1761; Feb. 9, 1863, c. 25, sec. 2, 12 Stat. 646. This was amended by the Act of July 11, 1940, c. 580, 54 Stat. 751; 5 U. S. C. A. 56, and now requires that nomination of certain of such recess appointees must be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

The statute has been construed by several Attorneys General over a period of years. All have recognized the effectiveness of the withholding feature but none has even suggested it might be an encroachment on the executive prerogative or that it would in any way cause an appointment otherwise valid to be null and void.

Thus, in 1880, Attorney General Devens advised the President [41] that

> "This legislation, (R. S. sec. 1761) in assuming to act upon the salary of officers appointed during the recess of the Senate when the vacancies actually existed while the Senate was in session, must be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution. In postponing the payment of the salary of the appointee until the Senate has given its assent to the appointment, it concedes the right of the President to appoint, although it undoubtedly embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous."

Subsequently, the Chief Executive was counseled by Attorney General Brewster [42] that

> "The office of United States attorney for the northern district of Georgia, which has become vacant during the present session of the Senate, may be filled during the next ensuing recess of the Senate by a *temporary appointment* by the President."
>
> * * * * * * *
>
> "It is, however, to be observed in this connection that payment of the salary of the appointee, in such case, is by section 1761, Revised Statutes, postponed until he has been confirmed by the Senate."

Much later the effect of this statute was again reviewed and the then Attorney General advised the President [43]

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[41] 16 Op. At. Gen. 522, 531.

[42] 17 Op. At. Gen. 521 (1883).

[43] 32 Op. At. Gen. 271 (1920).

that where vacancies on the Interstate Commerce Commission and the United States Tariff Commission which existed while the Senate was in session were filled after adjournment of the Senate by the issuance of recess commissions, the appointees could not be paid their respective salaries under such recess appointments.

From the Constitution itself, and, especially, in the light of the consistent interpretations of the administrative officials charged with advising and counseling the President, it may be concluded that the President's power of appointment is in no manner impaired by withholding the compensation of his recess appointees and requiring their nomination to the Senate within a fixed time after the commencement of the next succeeding session of the Senate. The act required is a lawful one, and it may be made a condition precedent to the payment of compensation.

Office and compensation are, therefore, separate and distinct things. The latter is not an indispensable incident to the former. The control over compensation is lodged exclusively in the Congress (cf. Embry v. United States, 100 U. S. 680). Since Congress under the Constitution may decline to appropriate money for any purpose which it considers not to be for the general welfare, it is immaterial that the executive powers over appointments and removals may be incidentally affected. So long as the Executive is under no compulsion to exercise his powers, it cannot be successfully maintained that his prerogatives are invaded.

Section 304 was Clearly a Valid Exercise of Congressional Authority Over Public Funds.

The following pertinent constitutional provisions are involved:

> 1. "The Congress shall have Power to lay and collect taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States . . ." (Art. I, Sec. 8, Cl. 1)

2. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." (Art. I, Sec. 9, Cl. 7)

3. "The Congress shall have power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Art. I, Sec. 8, Cl. 18)

The first and paramount power confided to the Congress by the Constitution is the power to appropriate public funds "to pay the debts and provide for the . . . general welfare of the United States."[44] The first clause governing the consideration of bills in Congress provides that all money bills must originate in the House.[45]

It was not by mere accident that the framers of the Constitution gave the power of the purse a place of preeminence in the Constitution. As eloquently stated by Mansfield in "The Comptroller General,"

> "The roots of legislative supremacy in finance reach deep into the heritage of English political institutions . . . Parliament stood in the popular role of protector of the pocketbooks of the nation. The incidents in the story, from the financial embarrassments of James I to the Revolution of 1688, were familiar to all who shared the political traditions of England. They spelled out one principal lesson: legislative control of the purse is the best practical guarantee of the maintenance of representative government * * * It was from the depths of political conviction, therefore, that the framers of the Constitution vested in Congress the taxing and spending powers, and added the provision that 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.' There the powers remain . . ." (pp. 6, 7)

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[44] Art. I, Sec. 8.

[45] Art. I, Sec. 9, Cl. 7.

Respondents and the Attorney General have joined in urging that the present exercise of control over public funds be stricken down because if the power of Congress to withhold appropriations on the conditions laid down in Section 304 be sustained the power may be abused.

But to all such arguments the simple answer is that the possibility of abuse is never a ground for setting aside an act when the power of enactment is clear. The argument is one of policy rather than power. As early as 1798, Mr. Justice Iredell said that:

> "It is not sufficient to urge that the power may be abused, for such is the nature of all power—such is the tendency of every human institution." (*Calder* v. *Bull*, 3 Dall. 400)

Respondents argued in the Court of Claims:

> "But the examples of what might be done under a power of Congress to appropriate free from all restraint are limited only by one's imagination. No money shall be used to pay Secretary Morgenthau, or Justice Murphy, or Senator Barkley, or any person who voted for Dewey, or any Catholic. No money shall be paid to any Supreme Court Justice unless the decision in *Smith* v. *Jones* is rendered in favor of Smith. No money shall be paid the State Department until Argentina is extended full recognition, or Russian recognition is withdrawn. That is not to say that such measures are likely. We agree, with Mr. Justice Stone, that 'Courts are not the only agency of government that must be assumed to have a capacity to govern.' *United States* v. *Butler*, *supra*, at p. 87."

It is well settled that the:

> ". . . possible abuse of a power is not an argument against its existence." *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161.

Every argument advanced by respondents and by the Attorney General against the powers here under consideration

was advanced against every great power confided by the Constitution to either of the departments of Government, by those who urged rejection of the Constitution; but every such argument was answered in "The Federalist" and disposed of by the people of the United States when they adopted the Constitution. In the present case, the record is clear that there was no abuse of power.

The precise question presented here has never before been adjudicated in our courts. It may well be supposed that the existence of the power of Congress in its absolute discretion to withhold funds is so clear that heretofore no one has thought to challenge the exercise of the power. As Mr. Chief Justice Chase said in *Mississippi* v. *Johnson*:

> "It was admitted on the argument that the application now made to us is without a precedent; *and this is of much weight against it.* . . . The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained." (4 Wall., 500)

As stated by Wilmerding in "The Spending Power":

> "From the founding of our government down to the present time everyone has understood and accepted the proposition that the right of granting supplies of money to the Executive and of appropriating them to the several branches of the public service belongs exclusively to Congress. *This is one of those maxims of state that have ceased to be subjects for discussion and have become articles of faith.*" (Preface, p. iii)

As the Court of Claims said in the Hart Case:

> "The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people." *Hart* v. *U. S.*, 16 Ct. Cl., 484; see *Collins* v. *U. S.*, 14 Ct. Cl. 568.

The framers of the Constitution were not content to grant to Congress the power to tax and to spend. They

went a step further and provided that except in pursuance of an appropriation by Congress no money could be drawn from the Treasury. This provision—operating on all persons and all agencies, executive and judicial alike—clearly vests in Congress complete discretion as to whether it will authorize money to be withdrawn from the Treasury for any particular purpose; and its decision not to authorize the withdrawal is conclusive upon all. Such a refusal creates no private rights—certainly no private rights cognizable by the judiciary.

The question presented by a Congressional refusal to appropriate is political in nature. Though presented here in a new form, it is no different in character than that considered by our forefathers and decided in England *as a political question* more than a century before the American revolution.

The importance of the present case is attested by the fact that *never in the history of the United States have the courts invalidated an act of Congress directing the withholding of public funds, either absolutely or conditionally.* The implications of a decision against the Government in this case are obvious, for Congress has, since the beginning of our Government, exercised the right to withhold funds, in its complete discretion. The statutes are replete with permanent limitations on the expenditure of public funds, and the authority of executive officers to commit the Government to incur obligations to pay out public funds. In addition, many such temporary limitations appear from year to year in the annual appropriation acts for the various departments, agencies, and instrumentalities of Government.

We are dealing here with exceptions to lump sum appropriations. "When the Federal Government occupied its permanent seat in Washington, it brought a hundred and thirty-odd employees and a few boxes of records."[46]

[46] James M. Beck and Merle Thorpe, "Neither Purse Nor Sword," p. 166.

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There is no question that at the outset Congress could have made specific appropriations for every purpose *and for every person* in the employ of the executive branch. In so appropriating, it could unquestionably refuse or fail to appropriate for particular employees by *merely leaving their names off the list of those appropriated for.* It has continued to this day to make appropriations to pay the salaries of occupants of designated positions in instances where that course is regarded as necessary or desirable.

But the growth of the executive branch of the Government to a point where it now has nearly three and one-half million employees made specific appropriations for personal services impracticable. As a matter of convenience, Congress resorts to lump sum appropriations, conditioning them by exceptions, limitations, and restrictions of various kinds.

To hold that Congress may not make such exceptions to a lump sum appropriation as it sees fit, under conditions which now prevail, would produce the very practical difficulties which the lump sum method was designed to overcome. The only alternatives open to Congress would then be to resort to specific appropriations for individuals by name or to relinquish to the executive branch of the Government a part of its constitutional power over appropriations.

(a) *General Nature and Extent of the Power.*

A discussion of the power of the purse requires a brief reference to its history, the manner in which the power originated in the Constitutional Convention, and the peculiar position of the House with respect thereto. The fundamental issue here involved antedates the formation of the United States Government itself, yet today the plenary legislative power to control the expenditure of the taxpayers' money is being challenged. The very definition of an appropriation,—"the act of setting apart or assigning to a particular use or person in exclusion of all others"

—sustains the power of Congress to enact the provision challenged in these suits.

As the Colonists were settling in America, the House of Commons was maintaining its right to withhold public funds. The Petition of Right (1628) was a demand by Commons that Charles I assent to the conditions thereof "previous to any grant of supplies."[47]

When Parliament demanded of King Charles I "an account of the expenditure" in connection with the Dutch War, "Charles at first resisted the proposal as a *breach on his prerogatives;* but in the finish, with his usual subtle adroitness, he gave way."[48]

Later (1689) the power of Parliament to levy "money for or to the use of the Crown" was asserted in the Bill of Rights accepted by William and Mary. This Bill of Rights provided that money could not be used by the Crown "for other time and in other manner than the same is or shall be granted."[49]

In his "History of the Committee on Appropriations"[50] the late Chairman Taylor[51] says that the framers of the Constitution:

> "had the benefit of intimate knowledge of the history of the evolution of parliamentary democracy under the British Constitution and it is generally recognized that they were guided by the centuries of experience of the English race in the mother country in evolving the processes of free government. Among these, and of transcendent importance, was the question of levying taxes and of appropriating the funds 'for carrying on his Majesty's Government' or for the executive branch. As a result of a long and determined struggle, this prerogative was finally lodged exclusively in the House

[47] Formation of The Union Under the Const., p. 519.

[48] Encyclopædia Americana,' Vol. 13, p. 188.

[49] Formation of the Union Under the Constitution, p. 526.

[50] H. Doc. 299, 77th Cong., 1st Sess.

[51] Chairman, House Committee on Appropriations, served in Congress twenty years.

of Commons, that arm of the Parliament closer to the people and more responsive to the public will."

Taylor's authoritative treatise continued:

"The Committee on Appropriations of the House is the instrumentality . . . through which the House exercises its *exclusive prerogative* to originate general appropriation bills. This exclusive function was conferred upon the House by the people themselves in a specific provision in the original Constitution, which has remained unaltered to this day . . ."[52]

"Unfailingly, throughout over a century and a half of the existence of the Government, the House has asserted and successfully maintained its exclusive right in this matter . . . the very keystone of the arch of the compromise upon which the Constitution rests, and without which it is not certain the Union of the States would ever have been achieved, is the provision under which it has been held from the beginning that appropriation bills, as well as tax bills, must originate in that House of the Congress closer to the people . . ."[53]

"One of the most ancient and valued rights of the Commons is that of voting money and granting taxes to the Crown for the public service . . . They upheld it with a bold spirit against the most arbitrary of kings, and the Bill of Rights crowned their final triumph over prerogative." (May's Const'l History of England, Vol. 1, p. 374)

"It is the glorious tradition of the land from which we get our laws that the House of Commons shall protect with every safeguard the money of the people. It is an inheritance which this House of Representatives has maintained during the existence of our Government with singular fidelity." (Cong. Rec., 58th Cong., 2d Sess.; Rep. Olmstead—manager of impeachment proceedings against Judge Charles Swayne)

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[52] "All bills for raising revenue shall originate in the House of Reps.," Art. I, Sec. 7; "Bills for raising revenue" include "bills to appropriate revenue." See Rule XI, 3, House Rules & Manual and Taylor's History, p. 4.

[53] Taylor's "History of the Committee on Appropriations," p. 4

In 1625 the House of Commons postponed the supplies demanded by Charles I for carrying on the war with Spain.[54] Fifty years later, Commons withheld funds from Charles II.[55] In 1677 they refused him an additional revenue.[56] In 1685 Commons granted only one-half the revenue requested by James II.[57]

The power of the House of Commons to withhold public funds was exercised in more modern times. The salary of the traveling agent of the National Gallery was refused in 1858.[58]

Although it has seldom been necessary,

> "it is within the power of the House of Commons in Committee of Supply, to reduce any such vote by omitting the amount of any *particular salary* . . ."[59]

(b) *If Congress Has Plenary Power to Appropriate, It Follows, of Course, That Congress May Refuse to Appropriate.*[60]

Alexander Hamilton had no doubts on this subject.

> "The House of Representatives cannot only *refuse*, but they alone can propose, the supplies requisite for the support of the Government. They, in a word, hold the purse, that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the Government. This power over the purse may in fact be regarded as the most complete and effectual

[54] Parl. Hist., ii, p. 35, cited by May, p. 375.
[55] Idem, iv, p. 757, cited by May, p. 375.
[56] Idem, p. 1000, cited by May, p. 375.
[57] Idem, p. 1379, cited by May, p. 375.
[58] Footnote, May's Cont. Hist. of Eng., Vol. 1, p. 375.
[59] Parl. Gov't. in Eng., Vol. I, p. 395.
[60] Subject only to the provisions of the Constitution respecting salaries of the President, judges, and members of Congress.

> weapon with which any constitution can arm the immediate representatives of the people *for obtaining a redress of every grievance* and for carrying into effect every just and salutary measure." "Federalist," No. 58. (Italics supplied)

The complete and exclusive legislative control of public expenditures has been sustained when in conflict with a treaty,—"the Supreme Law of the Land."[61] Perhaps the most jealously guarded executive prerogative is the power to make treaties;[62] nevertheless, all authorities agree that this power may not be effectively exercised in conflict with the legislative power to withhold appropriations.

In his "Discourse on the Constitution," Calhoun says that the Constitution:

> "gives to Congress as the law making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations and thereby, an important control over the treaty making power wherever money is required to carry a treaty into effect; which is usually the case . . ." (Willoughby, Vol. 1, p. 562).

Justice McLean, in his work, "Constitutional Law" (p. 347), says:

> "a treaty is the supreme law of the land in respect to such matters only as the treaty making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution . . . so far as the treaty stipulates to pay money the legislative sanction is required."

When the treaty for the purchase of Louisiana was negotiated, President Jefferson sent the document to the House of Representatives for an appropriation. In his message

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[61] Art. II, Sec. 2.

[62] By and with the advice and consent of the Senate.

to the House, Jefferson advised that he was submitting the treaty for the exercise of legislative functions:

> "as to those conditions which are within the powers vested by the Constitution in Congress."[63]

When the purchase of Alaska was negotiated, in 1867, Congress again asserted its power to withhold appropriations for the execution of treaties. At the insistence of the House, the appropriation involved in the treaty was prefaced with the statement that the treaty could not be carried into effect except by "consent of *both* Houses of Congress."[64]

While Article II, Section 2, gives the President the power to pardon, it does not supervene the plenary legislative control of the purse:

> "Monies once in the Treasury can only be withdrawn by an appropriation made by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, *as there is to all his powers*, it cannot touch monies in the Treasury of the United States except expressly authorized by Act of Congress. The Constitution places this restriction upon the pardoning power."[65]

The pardoning power does not restore a right to recover money the payment of which is forbidden by an act of Congress, or to recover property forfeited into the Treasury.[66]

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[63] Moore, Digest of International Law, V. 759.

[64] Willoughby on the Const., Vol. 1, 2d Ed., p. 551.

[65] *Knote* v. *U. S.*, 95 U. S. 149, 24 Law. Ed. 442. See *Austin* v. *U. S.*, 155 U. S. 417, 424.

[66] *Hart* v. *U. S.*, 118 U. S. 62, 30 Law. Ed. 96.

(c) *The Power to Appropriate "For The General Welfare" Embraces The Power to Place Limitations And Conditions On Appropriation Bills.*

The majority opinion in *U. S.* v. *Butler*, 297 U. S. 86, concurs with Hamilton and Story on the proposition that the substantive legislative power to appropriate:

> "is limited only by the requirement that it shall be exercised to provide for the general welfare of the United States . . . the power of Congress to authorize expenditure of public monies for public purposes is not limited by the direct grants of legislative power found in the Constitution." (pp. 65, 66)

The majority in the Butler case pointed out that they were:

> "not concerned here with a provision that if certain conditions are not complied with the appropriation shall no longer be available . . . There is an obvious difference . . ." 297 U. S., pp. 80, 81.

The plenary legislative power over appropriations was reaffirmed in *Helvering* v. *Davis*, 301 U. S. 619, in which Mr. Justice Cardozo said that "It is now settled" that "Congress may spend money in aid of the 'general welfare.'" And as to what constitutes "general welfare," the court reaffirmed the rule that the discretion to decide "*is not confided to the courts. The discretion belongs to Congress* unless the choice is clearly wrong . . . This is now familiar law."[67] (p. 640)

The Constitution authorizes Congress to appropriate public funds for one purpose only—to promote the general

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[67] "When money is spent for the general welfare, the concept of welfare or the opposite is shaped by Congress . . . " *U. S.* v. *Butler*, 297 U. S., p. 645. (See *Cincinnati Soap Co.* v. *U. S.*, 301 U. S. 308, P. 313.)

". . . Whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, P. 515.

welfare. If Congress concluded, as it did here, that the expenditure of public funds for the payment of plaintiffs' salaries would not be for the general welfare, it had no alternative under the Constitution—it was *required* to provide such conditions and limitations as would satisfy the legislature that its appropriations would be used for the general welfare; otherwise, appropriations would lose their constitutional sanction. We submit that Solicitor General James M. Beck was correct when he said that the Myers[68] opinion was in no way inconsistent with the doctrine that:

> "... the Congress, in appropriating public money has the right to see that the money is used for the purposes for which appropriated." (Our Wonderland of Bureaucracy, p. 61)

Having determined *prima facie* that the expenditure of public funds with which to pay respondents' salaries would not be in the National interest, it was incumbent upon the House to withhold funds for that purpose. However, Section 304, as modified, was not even an absolute refusal to appropriate to pay plaintiffs' salaries—it would have been inoperative as a withholding proviso if the executive department had elected to nominate plaintiffs and the Senate had found, in effect, that it would have been in the National interest to spend public funds for their salaries.

The various state courts have considered the nature of an appropriation and uniformly support the doctrine that an appropriation does not remove funds from the Treasury. *Ristine* v. *State*, 20 Ind. 328, 331; *State* v. *Kenney*, 9 Mont. 389; *State* v. *Moore*, 50 Neb. 88; *Stratton* v. *Green*, 45 Calif. 149, 151; *State* v. *Derham*, 61 S. C. 258, 263; *Brown* v. *Honiss*, 74 N. J. L. 501, 521.

In *Brown* v. *Honiss*, the New Jersey Court pointed out:

> "The appropriation of public money and its disbursement are two different and separate acts. Webster's definition of 'appropriation' so far as here pertinent,

[68] *Myers* v. *United States*, 272 U. S. 52.

> is: 'The act of setting apart or assigning to a particular use or person in exclusion of all others; application to a special use or purpose, as of money, to carry out some object' . . . In our systems of government, federal and state, the appropriation and payment of public moneys are always kept distinct, and appropriations are often coupled with some condition whose performance is to come after the appropriation but before the actual payment."

It being established that funds remain in the Treasury following an appropriation, *it follows that they remain subject to the control of the Congress;* and a refusal to permit appropriated funds to be used for a particular object may not be questioned in the courts. The executive branch has no vested right to appropriated funds.

In *Cincinnati Soap Co.* v. *United States*,[69] the present respondents' counsel successfully urged that the power to appropriate is a plenary legislative power. Mr. Justice Sutherland, speaking for a unanimous court, said that the extent to which Congress will appropriate money in aid of moral obligations "is a question for the determination of the political departments of the Government" (p. 319) and that such questions are "not for judicial but for Congressional consideration and determination." (p. 320)

> "That Congress has wide discretion in the matter of prescribing *details* of expenditures for which it appropriates must, of course, be plain. Appropriations and other acts of Congress are replete with instances of general appropriations of large amounts to be allotted and expended *as directed* . . ." (pp. 321, 322)
> "Queries directly or indirectly challenging the wisdom or necessity of the Congressional action, are all matters, as we repeatedly have pointed out, with which the courts have nothing to do." (p. 324)
> "It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation."[70]

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[69] 301 U. S. 308.

[70] *Hooe* v. *U. S.*, 218 U. S. 333.

While, as a general rule, Congress may not restrict one's liberty of contract under the Fifth Amendment, acts withholding appropriations, in apparent conflict therewith, must be upheld. In *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208, the Supreme Court held that notwithstanding a prior contract between attorney and claimant for a fee of fifty per cent of the sum appropriated for the claimant, and notwithstanding that services had already been rendered when the statute was passed, Congress might condition the appropriation so as to limit the attorneys' fees to twenty per cent of the recovery. Despite the prior contract protected by the Fifth Amendment, the Court held that:

> "'. . . Calhoun's claim for a balance due as fees cannot be paid out of the moneys appropriated by Congress . . . or recognized as having any validity as against that fund." (p. 220)

and that:

> "Whatever might have been the moving considerations, the power (to withhold appropriations) exercised must be sustained." (p. 219)[71]

Sec. 12 of the Hatch Act in pertinent part provides that no officer or employee of a state or local agency employed principally in connection with an activity financed by Federal loans or grants shall indulge in certain political activities. Charges of violation are investigated by the Civil Service Commission, which, after a hearing, if it so finds, may notify the state or local agency of its determination that the offending employee should be removed. Section 12 then provides:

> *If in any case the Commission finds that such officer or employee has not been removed from his office or employment within thirty days after notice of a determination by the Commission that such violation warrants his removal; or that he has been so removed and has subsequently (within a period of eighteen*

[71] See also *Calhoun* v. *Massie*, 253 U. S. 170.

months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation; * * (18 U. S. C. 61 l (b)).

These provisions have been challenged in two cases: *Stewart* v. *United States Civil Service Commission,* District Ct., Southern District Georgia, June 29, 1942, 45 F. S. 697; and *Neustein v. Mitchell,* District Court, Southern District New York, Nov. 22, 1943, 52 F. S. 531. In each case the Civil Service Commission had proceeded to find an employee of a state agency financed in part by Federal funds guilty of political activities proscribed by Paragraph (a). Proceedings were brought under Paragraph (c) of 18 U. S. C. Sec. 61 l to review the determination thereunder of the Civil Service Commission.

In each case the contention was advanced that these provisions were unconstitutional in that they infringed upon state rights guarateed by the Tenth Amendment. In each case the court held that the provision was constitutional. In the Neustein case, the court stated:

> "The constitutional question requires little consideration. Congress had power to attach proper conditions to loans and grants of Federal funds . . . this clearly was a proper condition to the loans or grants to the State . . ." (p. 532)

It then went on to state that the condition clearly was a proper one not open to the charge that it coerced the state, and that under the Hatch Act the state is under no compulsion to discharge an employee found guilty of violating Paragraph (a) but may retain him subject to withholding by the Federal Government from its grants of an amount equal to his compensation for two years.

In the Stewart case the court remarked (p. 700):

> "The proceeding was under Sec. 12 of the Act, which was enacted by Congress to safeguard and supervise expenditures of appropriations made by it. It does not provide for any judgment against the plaintiff or the state or compel them to do anything they are unwilling to do, but merely authorizes the withholding of Federal funds unless its protective provisions are complied with. This is a legitimate condition to the granting of Federal funds and in no way infringes upon any right of plaintiff or the state." (In the Stewart case the State of Georgia intervened)

In the Stewart case the plaintiff had also contended that the proceedings of the Civil Service Commission were inadequate because the proceeding was essentially a criminal proceeding and the necessary safeguards to the accused had not been met. The court dismissed this contention.

It is interesting to note that under Sec. 61 l (b) the plain intent seems to be to have the offending employee removed, since the withholding of the funds only occurs if he has not been removed. Furthermore, the withholding of funds directly attaches to the employment of the offending employee, since under the statute if he is transferred to another agency financed by Federal funds, the withholding then applies to such agency.

We submit that the power to appropriate *ex necessitate rei* includes the power to withhold appropriations and that:

> "It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation."[72]

[72] *Hooe* v. *U. S.*, 218 U. S. 333.

(d) *Respondents' Position Is Not Supported By Legislative Precedents.*

Respondents asserted in the court below that legislative precedents condemn Section 304 and cited certain so-called legislative precedents[73] which are here considered.

In examining these precedents it should be borne in mind that

> ". . . it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other . . ." *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318.

Respondents cited the case of Major Charles C. Cresson and quoted the views of two individual members of Congress to support the proposition that Congress was without the power to enact Section 304. The views of those two members were not adopted by the House. On the contrary, a decision was rendered on the same day holding a similar proviso in order. This legislative precedent will be discussed more fully in connection with the case of Col. Hunt, *infra*. In the Major Cresson case, the action of the House in declining to withhold funds for Major Cresson's salary cannot be said merely to reflect the views of two individual members, or to have proceeded on other than policy grounds.

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[73] A legislative precedent is established by ruling and decision of the Speaker or Chairman, which any individual member may appeal to the House itself and which is binding until reversed, or, of course, in the absence of a ruling, by a vote of the House. See Rules and Manual, House of Representatives, Rule 1, Sec. 4, p. 286. Decisions of the Speakers and Chairmen of the Committee of the Whole House "are to the rules of the House what the decisions of the courts are to the statutes." See Rules and Manual, House of Representatives, p. (vi).

In the case of Col. Hunt respondents argued below that the failure of Congress to withhold Col. Hunt's salary indicates a legislative decision that Congress is *without the constitutional power* to enact the proviso. Plaintiffs supported this proposition by quoting one individual member. The absolute tenuousness of respondents' reliance upon the Hunt case as authority is demonstrated by the following decision rendered by the Chair and reported in the Congressional Record, 68th Cong., 1st Sess., P. 5041. On March 26, 1924, the Army Appropriation Bill was under consideration in the Committee of the Whole House on the state of the Union, when the Clerk read this paragraph:

> "Pay of persons with retired status: For pay of the officers on the retired list, $7,032,337: *Provided,* That no part of this sum shall be paid to Col. John E. Hunt, United States Army, retired."

In making a point of order against the proviso in the paragraph, Representative Dickinson argued:

> "Mr. Chairman, it is my contention that a limitation can not in effect repeal existing law. Under the present existing law it is the duty of the proper officials of the Government to pay to Colonel Hunt the retired pay of a colonel under the pay bill of the Army. That is entirely an executive function. In effect, this proviso repeals that law in that it deprives Colonel Hunt of his pay in this appropriation bill. He could go to the Court of Claims and have a decision rendered and receive his pay. *It is an interference with an executive function.* It is not a proper limitation on an appropriation bill."

The Chairman ruled:

> "If the gentleman's argument were addressed to the merits of the question, what the gentleman from Iowa had said would be persuasive, but it has been pretty thoroughly established that Congress may refuse to appropriate for a perfectly legitimate purpose. In the mind of the Chair it is purely a limitation. It does not restrict the discretion of any executive officer.

It simply declines to appropriate for a perfectly legal object. The Chair overrules the point of order."

In Col. Hunt's case, no vote was taken on the question of legislative *power* to withhold appropriations for salaries. The only question which was before the House was whether or not the employee involved *should* be paid.

The third instance offered to support the proposition that "legislative precedents condemn Section 304" was the action taken on an amendment providing that no part of certain funds could be used for the payment of salary to the Superintendent of the Great Smoky National Park. Again, they rely upon the views of two members of Congress as reflecting a legislative intent to establish the precedent that Congress is without power to adopt Sec. 304. Again, the action of Congress in no way amounts to a recognition of lack of power.

In answer to respondents' reference below to the case of Dr. Ruth Gruber as a precedent, it is sufficient to indicate that this amendment was adopted by the House; and that while it was not agreed to in the Senate, no objection was made on constitutional grounds.

Perhaps the most tenuous of all "legislative precedents" cited is a reference to the fact that Congress took no action on a bill introduced to prevent the use of certain funds "during the service of the present Governor of Puerto Rico." Of course, since this bill (like hundreds of others) was never brought up on the floor, it was never considered. The mere introduction of a bill and the fact that "it died" is utterly immaterial. Furthermore, the bill referred to by plaintiffs originated in the Committee on Agriculture; and since this committee has no jurisdiction of appropriation bills, under the rules of the House, the measure could not have been considered on the floor.[74]

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[74] Rule XXI, 4 provides "No bill or joint resolution carrying appropriations shall be reported by any Committee not having jurisdiction to report appropriations." Rules and Manual, House of Representatives, p. 397. Rule XI, 3 places jurisdiction of appropriations in the Committee on Appropriations, *id.*, p. 309.

The last example advanced by respondents in the Court of Claims is the action of the Senate in 1942 in striking out a proviso which would have withheld any part of an appropriation for the payment of salary to Goodwin Watson, one of the present respondents. The action taken on the Watson proviso in 1942 is not a trustworthy precedent, for the reason that it was overruled the following year, when Congress enacted Section 304.

In summarizing the argument that legislative precedents condemn Section 304, respondents, in effect, asked the Court to consider also "the dangers" which they contend Congress has usually recognized in the practice of which Section 304 is the result. We agree that many governmental practices may be fraught with dangers. Such dangers are not peculiar to action of the legislative department. However, the fact that a legislative policy may be dangerous has no bearing upon the constitutionality thereof. The courts have held repeatedly that the judiciary will not attempt to determine whether or not a legislative policy is wise, may be abused, or whether the policies of Congress are expedient or inexpedient. It is too well settled for argument that

> "Considerations of that sort must, in general, be addressed to the legislature." *License Tax Cases*, 5 Wall. 462, 469.

In 1876 the House adopted the "Holman Rule," which obtains today, and which provides that germane amendments to appropriation bills are in order if they "retrench expenditures . . . by the reduction of the compensation of any person paid out of the Treasury of the United States . . ."[75] (Rules and Manual, House of Representatives, Rule XXI, Cl. 2, P. 834). The language of the above rule leaves no doubt that the House construes its power over appropria-

[75] The rule also provides that amendments are in order which "retrench expenditures by the reduction of the number and salary of officers of the United States."

tions to embrace the power to reduce the compensation of *any person* paid out of the Treasury of the United States."[76]

Congress rarely passes any important appropriation bill without incorporating various limitations and conditions.

> "The Committee on Appropriations today, in nearly every bill it reports, does propose some limitations."[77]

Innumerable decisions of the Speaker and Chairman of the Committee of the Whole House indicate conclusively that the House has never had the slightest doubt as to its power to place conditions and limitations on appropriation bills. It was well stated by Chairman Nelson Dingley in 1896 that:

> "The House in Committee of the Whole has the right to refuse to appropriate for any object, either in whole or in part, even though that object may be authorized by law" Cong. Rec., Jan. 17, 1896.

On January 27, 1931, the Chairman ruled in order an amendment to the Independent Offices Appropriations Bill, proposed by Mr. LaGuardia, which provided:

> "That none of the money herein appropriated shall be used to pay the salary of a commissioner whose confirmation has been or is being reconsidered by the Senate or against whom ouster or removal proceedings have been instituted or authorized."

This amendment is of particular interest for the reason that the Senate had made an unsuccessful attempt to recon-

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[76] Ostensibly it might appear that a distinction could be drawn between a reduction of compensation and a reduction to naught. However, such a distinction, if tenable, is immaterial here, since, under plaintiffs' theory, a reduction even to a nominal sum would be "in effect" a removal from office, and, therefore, unconstitutional.

[77] Hon. Charles R. Crisp, Cong. Record, 65th Cong., 3rd Sess., p. 4163. For a voluminous compilation of limitations, conditions, and restrictions on appropriation bills, see "General Legislation Enacted on Appropriation Acts," 1897-1915, GPO.

sider and reject the nomination of a Federal Power Commissioner;[78] and, while the Senate could not withdraw its approval of him, the House had no doubt that funds might be withheld for payment of his salary. The amendment does not appear in the act as finally adopted, for the reason that pursuant to several policy arguments, *inter alia*, that it was improperly drawn, the House rejected the proviso. However, the most vigorous opponents of this limitation admitted that there was no question as to the *power* of the House to withhold the appropriations involved.

The following amendment to the State, Justice, Commerce, and Labor Departments Appropriation Bill was held in order as a limitation;[79]

> "*Provided*, That no moneys appropriated in this act for the enforcement of the prohibition amendment shall be expended in any State the legislature of which declines to directly appropriate a sum equal to the amount appropriated of the Federal appropriation estimated to be expended in said State for the enforcement of the prohibition amendment and laws applicable thereto" (Cong. Rec., 67th Cong., 1st Sess., p. 5210.)

Obviously, under the Constitution, the Congress has no power to order any state to pass legislation of any kind: however, the House had no difficulty in reaching the conclusion that funds might be withheld from any state which declined to enact certain legislation. As in Section 304, the above amendment did not require the states to enact any law. The states thereunder could have enacted the legislation referred to and obtained Federal funds or declined to enact it and foregone the benefit of the appropriation.

To the same effect was the decision of February 24, 1919, on an amendment which provided:

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[78] See *United States v. Smith*, 286 U. S., P. 30.

[79] Cong. Rec., 72d Cong., 1st Sess., p. 4560.

"That no part of the unexpended balance shall be made available for any State which permits the examination of females suspected of venereal disease to be made by a male physician." (Cong. Rec., 65th Cong., 3rd Sess., p. 4163.)

Hon. James R. Mann, perhaps the leading authority of his day, said:

"It is a mere limitation upon the expenditure of the money, precisely on all fours with the proposition about the appropriation for the benefit of soldiers' homes controlled by States. That is probably the leading case on the subject where a proposition was made that no portion of the money appropriated for the benefit of soldiers' homes owned by States should be given to the States if they permitted the sale of intoxicating liquor of any kind, including wine, beer, and so forth . . . It is clearly a limitation." (Idem)

On March 22, 1922, it was held that the House might provide that no part of an appropriation could be used for the payment of troops garrisoned in China, or certain men stationed in other designated areas. Hon. James R. Mann again addressed the Chair:

"Mr. Chairman, the power to do a thing and the exercise of the power are two entirely different things. We could provide in this bill that no part of this money should be paid to anybody in the Army but red-headed men or blue-eyed men. Having the power to make an appropriation, we can put a limitation in as to whom it may be paid . . . and whom it may not be paid to. That is the appropriation. That does not interfere with the power of the President. He can not maintain any troops unless we appropriate the money for it unless he paid it out of his own pocket. We have the power to say that we will not appropriate a dollar for any purpose. There is no power in the world except our constituency which can reverse our action. Having the power to appropriate, having the power to refuse to appropriate, we can appropriate on conditions with limitations. That is all this is. I ques-

tion the advisability of exercising the power. That, however, would be a matter for the Congress to determine. I do not see how there can be any question as to the power to put a limitation on the appropriation . . ." (Cong. Rec., 67th Cong., 2d Sess., p. 4295)

In his decision, the Chair stated that the Congress:

". . . has the power, through its control of the purse strings of the Nation to prevent an appropriation being made under certain conditions. There are a number of precedents on this point which are not worth while to cite, because the merits of the question here involved seem to the Chair entirely clear. . . .

"Congress has the complete and exclusive power to appropriate for the pay of the Army. It may grant or withhold appropriation to any extent it pleases. It has not the power to direct the President to do or not to do a particular thing with reference to the assignment of the Army to this country or that, but having the power to entirely withhold the appropriations that go for the pay of the Army it unquestionably has the power to direct that no part of the appropriations shall be used to pay that portion of the Army that is in a certain country or countries, as this provision does . . ." (Idem)

On January 28, 1911, an amendment was offered to the District of Columbia Appropriation Act providing that no funds appropriated therein could be expended for the construction of a reformatory on a site which had been selected pursuant to a prior statute authorizing such construction. In addressing the Chair, Representative Mann said:

"Does not the law and the Constitution also vest in Congress the discretion as to whether it will or will not make an appropriation for any purpose under the sun? They can go out and locate it where they please; we say that we will not pay the money for it."

The Chair ruled:

"Such a limitation is clearly in order under the rules and practice of the House, even though it forbade the

expenditure of any part of the appropriation for a purpose heretofore specifically authorized by law."[89]

Section 304, of course, did not compel the President to appoint plaintiffs with Senate concurrence—it did refuse an appropriation for their salaries for the reason that they were not so appointed? The Congress was fully cognizant of the constitutional doctrine involved and the extent of its power to deal with the problem. Moreover, it was not lacking in strong precedents to support the course it followed.

On May 21, 1918, Hon. Edward W. Saunders, who had served as Speaker of the House of Representatives and Judge of the Circuit Court of Virginia prior to his election to Congress, as Chairman handed down the following opinion:

". . . If the Chair understands the amendments it is intended as a limitation on the payment of any money under this paragraph until the President has issued a certain indicated proclamation which in his discretion he may or may not issue. *This amendment does not compel him to issue it*, but so long as it is unissued the House does not propose, if the amendment is adopted, to allow the Agricultural Department to have the benefit of the appropriation in this paragraph. In other words the amendment proposes to utilize the right of the House to appropriate, or not to appropriate, in its discretion, to an object authorized by law . . .

"This amendment does not compel the President to issue the proclamation referred to. He may issue it or refuse to issue it in his discretion. But the amendment in substance says to the Department of Agriculture: We propose to withhold from you the benefit of this appropriation during the full period of time during which this proclamation is unissued. That may be a very unreasonable ground for the House to take, but after all is not this question merely one of com-

[89] Chairman John Q. Tilson, Cong. Rec., 61st Cong., 3d Sess., p. 1613.

petency or power resting upon our authority to refuse or award an appropriation? * * *

"The matter proposed to be dealt with is an appropriation of money, and this body has the absolute power to determine whether it will or will not appropriate. In the exercise of that power we may do unreasonable things, arbitrary things, whimsical and absurd things, but after all the question is whether, with respect to the action proposed, we are within our powers . . ." (Italics supplied)

Chairman Saunders had some doubt that the amendment "in the form submitted" was "strictly and technically" correct; however, he resolved the doubt "in favor of the amendment" and remitted the same "to the determination of the Committee." (Cong. Rec., 65th Cong., 2d Sess., May 21, 1918, P. 6868)

On February 14, 1919, during consideration of the Army Appropriation Bill, an amendment was presented to withhold funds for the salary of any officer of the Army who promulgated

"any order prohibiting social intercourse between officers and enlisted men . . . while not on military duty . . ."

A point of order having been made, Chairman Edward W. Saunders, of Virginia, ruled:

"The Chair does not understand what offense is created by this amendment, or what punishment is fixed. A limitation, as has been often stated, deals negatively with the application of money which the House may, or may not appropriate, at its pleasure. It matters not how meritorious the subject matter may be, the House can decline to appropriate for the same. It can put a negative restriction upon the use of the money which is appropriated. We can not prescribe that money shall be used in some particular fashion, but we can provide how it may *not* be used . . .

"What are the provisions of this amendment? It does not impose any duty upon the officers referred

to. It merely declares that when an officer has done any one of the things mentioned, no part of the money appropriated shall be paid to that officer. It may or may not be a wise act on the part of the committee to agree to this amendment, but the Chair is not concerned with that phase of the situation. This amendment is simply a negative inhibition upon the use of the money appropriated. It provides that it shall not be applied under certain indicated conditions.

"It does not deal with anything but money . . . In the judgment of the Chair this is a limitation, conforming to the requirements of the precedents, and the point of order is overruled." (Cong. Rec., 65th Cong., 3d Sess., P. 3315)

In 1921 Senator Tom Connally, then a member of the House, introduced a proviso to the Naval Appropriation Bill, which provided that no funds appropriated therein could be expended:

". . . until the President of the United States shall have invited the Governments of all nations to send accredited delegates to an international convention to be held in the United States to consider ways and means of bringing about joint disarmament."

Despite the President's power under the Constitution to negotiate treaties and in the field of foreign relations, the Chairman held:

". . . the Chair is of the opinion now, as he was on a former occasion, that it is within the power, and he overrules the point of order." (Cong. Rec., 67th Cong., 1st Sess., p. 684)

A provision that no part of an appropriation be expended for salary in connection with any suit to enjoin labor unions from striking also has been held in order as a limitation. On April 7, 1922, the following amendment was offered to the State and Justice Departments Appropriation Bill:

"No part of the amounts appropriated in this paragraph shall be expended for the payment of any salary

> or compensation for legal services in connection with any suit or other proceeding brought in any court to enjoin any officers or members of a labor organization or labor union from suspending or quitting their employment."

The Chairman held that the amendment was in order because it simply proposed to withhold public funds to pay any salary or compensation for legal services rendered by those who do certain things, and which under general law those persons may be authorized or even directed to do. (Cong. Rec., 67th Cong., 2d Sess., p. 5210)

The one competent authority cited by respondents is a legislative precedent which *supports* Section 304 and is, we submit, directly opposed to the proposition for which the respondents cite it as authority. The amendment there involved (presented by Rep. Dirksen) was offered to the Emergency Relief Appropriation Bill on June 12, 1941, and provided:

> "That no part of any appropriations contained in this act shall be used to pay the compensation of David Lasser." (Cong. Rec., Vol. 87, P. 5110)

Respondents stated that, after attacks against its principle, it was agreed to by a vote of 131 to 88. A careful examination of the Congressional proceedings discloses that only three individual members of the House attacked the amendment and neither of them based his objections on constitutional grounds (Cong. Rec., Vol. 87, Pp. 5111, 5112); and that five representatives addressed the House in favor of the proviso, which was adopted June 12, 1941 (id., P. 5113).

Respondents endeavored to minimize this legislative precedent by making the point that "two weeks later, in further debates, the amendment was again attacked" by Rep. Voorhis and Rep. Flanagan. The belated so-called "attack" by Rep. Voorhis was not made on the ground of unconstitutionality, but because he viewed the amend-

ment as an "undignified thing for the House to do" (id., P. 5515). The only other so-called "attack" *was not contained in any debate on the floor of the House,* but was in the form of a prepared statement, or "Extension of Remarks," inserted in the appendix of the Congressional Record by Rep. Flanagan (Cong. Rec., Ap., Vol. 87, P. A. 2982).

Since neither the speech nor the appendix statement was before the House at the time the Lasser amendment was adopted, and since the Congress did not act in accord with these views, neither expression lends even the slightest support to the proposition that legislative precedents condemn Section 304.

On June 13, 1941, while the amendment was still under consideration, a request for a record roll call vote on the Lasser proviso was made by its author, whereupon 214 were recorded for and 114 against the amendment (Cong. Rec., Vol. 87, P. 5151).

The Lasser amendment was debated in the Senate and on June 20, 1941, the Senate went squarely on record in favor of this legislative precedent (Cong. Rec., Vol. 87, P. 5384, 5385).

A recommendation of an appropriations subcommittee that the Lasser proviso be repealed, was rejected by the House (See the legislative decision of Dec. 5, 1941, Cong. Rec., Vol. 87, P. 9494).

Although there was no vote on this decision an opportunity for a vote is afforded on all decisions of the Speaker or Chairman by Rule 1(4) of the House, which provides that such decisions shall be "subject to appeal by *any* member" (See Rules and Manual, House of Reps., Rule I, Sec. 4, P. 286).

Respondents contended in the Court below that the Lasser Amendment was also unconstitutional. Obviously, this opinion is contrary to the well-settled doctrine that—like all other acts—it is presumed constitutional.

The Lasser amendment *was passed by Congress, approved by the President, and became law.*[81] Not only is this case a valid legislative precedent, it is also an executive precedent. The President approved the act in which the proviso was contained, and he made no protest with reference thereto.

(c) *The Congress Has the Power to Appropriate For or to Withhold Appropriations From Individuals By Class or Name.*

We now consider the argument that this Court should deny the Congress power to withhold public funds, as it did by Section 304, because, *inter alia*, it affects individuals and is a permanent limitation on future appropriation acts.

Permanent limitations on appropriation acts which prohibit the use of funds to pay identifiable individuals are not novel. Aside from provisions containing permanent restrictions, most of the temporary limitations

> "once enacted . . . are continued from year to year and become, in substance though not in form, permanent legislation" (Mansfield, "The Comptroller General," P. 8)

Under immemorial practice, Congress has appropriated to individuals by name. A single illustration from the many available will suffice. The First Congress, in "An Act making appropriations for the support of Government for the year one thousand seven hundred and ninety," provided:

> "That out of the aforesaid appropriation . . . the payment of the following sums, not heretofore provided for by law, and estimated in the aforesaid report of the Secretary of the Treasury of the first of March instant, is hereby authorized and intended to be made,

[81] 55 Stat. L. 396.

to wit . . . To *Roger Alden*, for his services, including his office expenses, and the allowance to his clerks, eight hundred and seventy-three dollars, and seventy cents . . ."

The act further provided:

"That the sum of one hundred and twenty dollars, be paid . . . to *Johoiakim M'Toksin*, in full compensation for his services as an interpreter and guide in the expedition commanded by Major-general Sullivan, in the year one thousand seven hundred and seventy-nine; and also the sum of ninety-six dollars to *James Mathers* and *Gifford Dalley*, each, for services during the late recess of Congress." (Italics supplied) (1 Stat. L. 105)

Today, of course, one need only examine the private laws of any Congress to discover innumerable acts directing the Secretary of the Treasury to pay specified sums to individuals by name.

Permanent limitations as to classes of individuals are not uncommon. For example, the Appropriation Act of October 22, 1913, provided that

"No money appropriated by *any act* shall be used, for the compensation of any publicity expert unless specifically appropriated for that purpose" (38 Stat., 212; T. 5, Sec. 54, U. S. C.)

Revised Statutes 1761 (T. 5, Sec. 55, U. S. C.) provides, *inter alia*, that

"No money shall be paid from the Treasury to any person appointed during the recess of the Senate"

if the vacancy occurred when the Senate was in session and unless such person is subsequently confirmed by the Senate.

An early example of a statute permanently barring a designated class from the Federal payroll is contained in

27 Stat. 591, which has been in force for more than a half century, and which provides that

> "No employee of the Pinkerton Detective Agency, or similar agency, shall be employed in any Government service . . ." (Meh., 3, 1893)

While it is well settled that Congress may not designate the person to be appointed to a given office or position, Congress has exercised the power to appropriate for a particular office or position only so long as it is held by an identifiable individual. The Revenue Act of 1924 provided:

> "The salary of the Government Actuary, *so long as the position is held by the present incumbent* [Joseph S. McCoy], shall be at the rate of 7,500 a year" (Revenue Act of 1924, Vol. 43, pt. 1, Stat. L., P. 353)

The appropriation act granting an increase in salary for the Government Actuary provided:

> "For payment of the increase in the salary of the Government Actuary, as provided by Sec. 1102 of the Revenue Act of 1924 for the fiscal years that follow: For 1924—$281.95. For 1925—$2,300." (Defcy. Appro. Act of 1924, Vol. 43, pt. 1, Stat. L., P. 693)

The Act of 1926 also dealt with the same *individual incumbent*:

> "The salary of the Government Actuary, *so long as the position is held by the present incumbent*, shall be at the rate of $10,000 a year" (Rev. Act of 1926, Vol. 44, P. 129, Stat. L., pt. 2)

The above acts did not require President Coolidge to continue Joseph S. McCoy in the position of Government Actuary—he could have been removed by the President at any time; Congress simply provided that the sums specified could be used to pay the Government Actuary only so long as the incumbent (Joseph S. McCoy) occupied the position.

When it proposed the clause in Section 304 conditioning

payment of respondents' salaries upon their appointment by the President with Senate concurrence, perhaps the Senate had in mind, in addition to the Lasser precedent, *supra*, a statute passed during President Madison's administration. The Act of May 1, 1810, *inter alia*, set forth the compensation to be allowed certain secretaries of legations and embassies and secretaries to ministers. Section 2 provided:

> "That to entitle any charge des affaires, or secretary of any legation or embassy to any foreign country, or secretary of any minister plenipotentiary, to the compensation herein before provided, they shall respectively be appointed by the President of the United States, by and with the advice and consent of the Senate . . . and no compensation shall be allowed to any charge des affairs, or any of the secretaries herein before described, who shall not be appointed as aforesaid." (2 Stat. L. 608)

We find no prior statute *requiring* the President to appoint secretaries of legations and embassies or secretaries to ministers by and with the advice and consent of the Senate; however, President Madison, one of the founding fathers, approved the act containing the condition. The Act of 1810 left President Madison an option—he could appoint the designated functionaries by and with the advice and consent of the Senate, or he was free not to appoint them in that manner; Congress, however, provided that no money could be drawn from the Treasury to pay them if they were not so appointed.

> "It must be conceded at once that the sanction of withholding appropriations—an absolute power—might be used to secure an unconstitutional result. Should Congress, for example, repeal existing laws on the subject and appropriate for the salaries of the President and of the Justices of the Supreme Court less than they had been receiving, they would have no legal means of getting their usual pay despite the plain mandate that their compensation 'shall not be diminished.' So

also, if Congress made the appropriations for all governmental expenditures conditional upon the Comptroller General's prior approval of these, it is hard to see how payments could legally be made otherwise. But the absolute quality of the appropriating power does not extend—as against a challenge from the other two branches of government—beyond the sanction for its enforcement, the withholding of appropriations. *The executive is at liberty to treat a condition as unconstitutional if it is prepared also to forego the appropriation to which it is attached;* and the courts might conceivably go further, for they have claimed that separability is ultimately a judicial question." *Mansfield, The Comptroller Genral,* P. 78. (eItalics supplied)

We submit that Section 304 is not a legislative innovation. On the contrary, it is supported, as we have shown, by immemorial precedent.

Section 304 Did Not Deprive Respondents of Any Constitutional Right, Either as a Bill of Attainder, or by Denial of Due Process of Law.

We have demonstrated that the conclusion of the Court of Claims that Section 304 did not remove respondents from office was correct.

In his petition the Solicitor General first raises the question whether Section 304 undertook to terminate respondents' services. The second question raised is, "If so, whether Section 304, is constitutional." It is clear, therefore, that the petition raises no issues regarding the constitutionality of Section 304, unless that provision, as a matter of fact and law, removed the respondents from their offices. Thus, it restricts consideration of the validity of Section 304 under the constitutional prohibition against bills of attainder (Article I, Section 9, Clause 3), and under the due process clause of the Fifth Amendment. However,

in the Court of Claims respondents made various contentions regarding the invalidity of Section 304 under those provisions of the Constitution, and we wish to submit for the court's consideration the following observations concerning those contentions.

(a) *Section 304 Is Not a Bill of Attainder.*

In the Court of Claims respondents relied on several premises to sustain their argument that Section 304 is invalid because of the constitutional provision that "no Bill of Attainder or ex post facto Law shall be passed." (Article I, Section 9, Clause 3.)

Their basic premise was that permanent disqualification from gainful government employment is legislative punishment. Arguing that the prohibition against payment contained in Section 304 constituted punishment, respondents urged that its form, a denial of appropriations, is of no significance. That is to say either that Section 304 is something other than a denial of appropriations, cloaked as such, or that a denial of appropriation may be a bill of attainder.

Respondents' assertion that the form of Section 304 is insignificant must rest, as we have indicated, upon one of two grounds—either that Section 304 being a denial of appropriations was a bill of attainder; or, second, that Section 304 was not, in substance, a denial of appropriations. Plaintiffs relied on the second theory, arguing that Section 304 is not a denial of appropriation because (1) it is permanent legislation; and (2) its effect is to disqualify plaintiffs from office.

We have demonstrated that it is within the power of Congress to appropriate for specific purposes or to withhold money from specific objects, and that the power over appropriations may be exercised by permanent legislation. It is illogical to argue that a permanent denial is not in the nature of a denial of appropriation when a permanent grant

of funds is within the appropriating power. Section 304 was a denial of appropriation.

Respondents conceded that the power to withhold appropriations is unlimited. The tenor of their argument admitted that it would be within the power of this and succeeding Congresses to keep plaintiffs from the federal payroll by a provision in each appropriation measure. Congress having adopted the simpler method, the enactment of one measure containing the prohibition, the respondents assailed it as not being a denial of appropriation.

Respondents' other attack on the nature of the action taken in Section 304 was predicated on their conclusion that its effect was to disqualify plaintiffs from holding office. We have already disposed of the contention that a refusal to pay, *per se*, equals a disbarment from office. All that Section 304 did was to prevent the payment of compensation to respondents and thus prevent the executive agencies concerned from granting them rights to compensation.

The purpose of Section 304 was to deny payment of federal funds to persons examined and deemed unfit by the Congress to receive such funds. The means adopted was refusal to permit the payment of such funds to them. The powers exercised were congressional control over compensation and over the expenditure of federal funds. Respondents, however, assail the action on the ground that the resultant disqualification of plaintiffs from the federal payroll was punishment.[82] They urged that to deny named individuals access to public funds for services to the United States is to punish them.

Again, however, the respondents argued in the alternative, stating that, in fact, Section 304 was intended to punish respondents but, even if it were not, since Congress acted in regard to three named persons, the disqualification

[82] Respondents argued that they were disqualified from holding office. We have rebutted that contention, and it is only necessary to consider Section 304 as a conditional refusal to pay compensation for their future services.

allegedly resulting was punishment. The first contention, that Section 304 was intended to punish respondents for their past conduct, may be disposed of by an examination of the facts. The second thesis, that punishment was inflicted regardless of intention, requires an examination of the cases upon which respondents relied.

Respondents rested heavily upon *Cummings* v. *Missouri*, 4 Wall. 277, 18 L. ed. 356 and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366. In each case, the court found that the test oath it invalidated was imposed upon certain classes of persons with intent to punish them for past conduct. After pointing out that the test oath imposed upon priests and ministers bore no real relationship to the performance of their ministerial functions, the court, in *Cummings* v. *Missouri*, rejected the contention that the oath was imposed as a qualification for the callings:

> "The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. *It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment*, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen." (Italics supplied) 4 Wall. 320, 18 L. ed. 362

In *Ex parte Garland*, the court stated:

> "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be affected indirectly by a state under the form of creating qualifica-

tions we have held in the case of *Cummings* v. *Missouri*, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress." 4 Wall. 379, 18 L. ed. 370.

It is apparent that in each case the court based its conclusion upon a finding that the disqualification imposed by the test oath was intended as punishment, not upon the doctrine that it was, *per se*, punishment. It viewed the lack of relationship between the oaths exacted and qualification for the callings in question as evidence of the intention of the legislature.

While the decisions in the Cummings and Garland cases were based squarely upon a finding of intention to punish, there is dictum in each case which might support the proposition that disqualification from office is punishment *per se*. These dicta are as follows:

> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." *Cummings* v. *Missouri*, at 4 Wall. 321, 18 L. ed. 362

> "And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." *Ex parte Garland*, at 4 Wall. 377, 18 L. ed. 370.

However, that doctrine subsequently was rejected by the United States Supreme Court. *Dent* v. *W. Va.*, 129 US 114, 32 L. ed. 623; *Hawker* v. *New York*, 170 US 189, 42 L. ed. 1002; *Rietz* v. *Michigan*, 188 US 505, 47 L. ed. 563.

Dent v. *W. Va.* sustained a state law prescribing new qualifications for practicing physicians and making it a misdemeanor to practice without them. It disqualified persons

already practicing who could not produce proof of graduation from a reputable medical school. Distinguishing the Cummings and Garland cases, the court said:

> "The Constitution of Missouri and the Act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State." *Dent* v. W. Va., 129 US 114, 118, 32 L. ed. 623.

Hawker v. *New York* held valid a law barring from the practice of medicine those convicted of a felony before its enactment. In the course of its opinion, the court declared:

> "It is not open to doubt that the commission of crime, the violation of the penal laws of a state, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule,—one having no relation to the subject matter, but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state?" 170 US at page 196, 42 L. ed. at page 1006.

The Hawker case directly repudiates the dicta that disqualification from office or avocation or profession because of past conduct is *per se* punishment. It affirms the principle, also declared in *Cummings* v. *Missouri*, that

> "The deprivation of any rights, civil or political, previously enjoyed, *may be punishment*; the circumstances attending and the causes of the deprivation determin

ing this fact." (Italics supplied) 4 Wall. 320, 18 L. ed. 362.

Nor is respondents' contention that intention is of no importance when Congress deals with a named class or group a valid argument. It is one which finds no support in any of the cases cited by respondents, and is equally unsupported by reason.

The argument that an action taken in regard to a class sufficiently small as to be named, *eo nomine*, automatically is punitive in nature because it deprives them of the future exercise of a privilege, needs no answer. While action taken only in regard to some members of a class might be deemed to be evidence of punitive intent, there is no assertion or proof herein that respondents did not constitute the entire class. And, in any event, the record proves that Congress did not enact Section 304 to punish respondents for their past conduct. Just as the lack of a reasonable relationship between the test oath and the avocations indicated to the court in *Cummings* v. *Missouri* that the Congress intended to punish, so do the records in these cases conclusively demonstrate that the action taken was intended to protect the public welfare and not to punish.

By an assertion that the conduct of the respondents which convinced the legislature of their unfitness to remain on the public payroll bore no necessary relation to their work respondents in the lower court attempted to avoid the conclusion which the facts impel. The answer to that contention effectively was made by Mr. Justice Miller in a dissenting opinion delivered in *Ex parte Garland*, *supra*, wherein he stated:

> "That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo-Saxon race shows that, for ages past the members of the legal profession have been powerful for

good or evil to the government. They are, by the nature of their duties, the molders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. Few among their members are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the streams on which the life of the Nation depends, to be poisoned at its source." 4 Wall. 385, 18 L. ed. 372

Can it be said that the same high degree of fidelity and attachment to our system of government and the same sincere desire for its preservation are not valid requisites which the Congress may demand of those whom it pays from the public funds entrusted to its care? To us it would seem unconscionable to conclude that such fidelity is not a qualification for public office and that a refusal to expend the public moneys for the payment of employees and officers not possessed of that fidelity is punishment. The legislature has the affirmative duty not to expend the public funds for purposes contrary to the public welfare. Having ascertained that employees lack that fundamental qualification, the Congress would be derelict in its duty if it permitted them to receive compensation, merely because the power to remove them lies in the executive branch.

In this connection, a recent decision of the District Court of the United States for the District of Columbia in *Friedman* v. *Schwellenbach*, et al (Civil Action No. 27196, decided April 1, 1946) is pertinent. In that case the plaintiff sought a declaratory judgment, mandamus, and injunction, claiming that his discharge by the War Manpower Commission pursuant to order from the Civil Service Commission was improper.

The Commission had ordered his discharge because of his affiliation with the American Peace Mobilization, on the grounds that such membership constituted sufficient evidence to raise a reasonable doubt as to his loyalty to the Government of the United States, making him ineligible

for employment under the War Service Regulations issued pursuant to Presidential Executive Order. Granting the motion of the defendant for summary judgment, the court said:

> "The Commission found reasonable doubt of the loyalty of the plaintiff. It based its finding in part upon the fact that the plaintiff was a member of, and prominently and actively affiliated with the American Peace Mobilization; participated actively in its meetings and affairs, and served on several of its committees. There were reasonable grounds to believe that this organization was formed under the auspices of the Communist Party designed to influence the American people to oppose participation in the war against Germany. Within a month after the German invasion of Russia its name was changed to American Peoples' Mobilization and then favored assistance to Britain and Russia in a war against Germany. It can hardly be said that there could be no reasonable doubt of the loyalty of a member of a communist organization who opposed war against Germany so long as this country was an ally of Great Britain, a democracy, but became an advocate of war when this country became allied with Russia, a communistic and totalitarian state. The defendant did not find that the plaintiff was disloyal. It was not necessary to go so far; it merely found that it had a reasonable doubt of his loyalty."

The record in these cases contains ample evidence to cast a reasonable doubt upon the undivided loyalty of the respondents. It would be unconscionable to argue that in the face of that record the Congress was unwarranted in finding them unfit to receive compensation for their services out of the public treasury. It cannot be argued that the very evidence which justifies executive *removal* of employees from the federal service is inadequate to justify the legislature in asserting its full powers over compensation and the expenditure of the public moneys to deny employees similarly disqualified a place on the federal payroll.

We submit that Section 304 cannot be ruled invalid as a bill of attainder.

(b) *Section 304 Is Not a Denial of Due Process.*

Respondents based their assertion that Section 304 denied them due process on two grounds. They contended that it substantively violated the Fifth Amendment because it was an arbitrary and discriminatory disqualification from holding public office. And they argued that the procedure of the Kerr Committee denied them due process.

The short answer to the second contention is that the procedures of the Kerr Committee are immaterial to the constitutionality of the enactment. As the Court of Claims found, Congress, when it enacted Section 304, did not exercise a judicial function. (R. 39.) The stipulations and findings of fact below show that there was no denial of any procedural rights of respondents by the Kerr Committee.

The investigation conducted by the Kerr Committee was one in aid of the legislative functions, and when Congress passed Section 304 it complied with all procedural requirements of the Constitution regarding the enactment of legislation.

H. Res. 105, 78th Cong., 1st Sess., creating the Kerr Committee, directed it to inquire into "allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment," and further provided that, "Any legislation approved by the committee as a result of this resolution may be incorporated in any general or special appropriation measure emanating from such committee . . ."

The power of Congress, or either house thereof, to conduct an investigation in aid of its legislative functions is generally recognized. *Sinclair* v. *United States*, 279 US 263; *Electric Bond and Share Co.* v. *SEC*, 303 US 419; *McGrain* v. *Dougherty*, 273 US 135; Re Chapman, 166 US 661; *Kilbourn* v. *Thompson*, 103 US 168.

And the subject matter of the investigation conducted by the Kerr Committee is within the legislative power of Congress. Authority of Congress to prescribe qualifications for

office or employment in the federal government needs no citation. The investigation conducted was a legislative investigation. See *McGrain* v. *Daugherty*, *supra*.

We submit, therefore, that the procedures adopted are not challengeable by the respondents, who voluntarily appeared before the committee, and can have no bearing on the constitutionality of Section 304. *Norwegian Nitrogen Products Company* v. *United States*, 288 US 294.

There remains for consideration respondents' assertion that Section 304 substantively deprives them of life, liberty or property without due process. Respondents urged that it removed them and disqualified them from holding office. We have disposed of the contention that Section 304 removed them.

Therefore, we may discuss the proposition that a refusal to authorize the payment of compensation to named persons violates the due process clause.

Since the control of the moneys in the Treasury is in the hands of Congress, and for its exercise of that control the Congress is responsible only to the people, a refusal to appropriate for any specific purpose, including payments of compensation, may not be assailed as a violation of the due process clause of the Fifth Amendment. Hart's Case, *supra*.

Willoughby points out that in *Davidson* v. *New Orleans*, 96 US 97, which first accepted the doctrine that legislation substantively may violate due process, the reasoning upon which the conclusion was reached was as follows:

> "Shortly stated it was that a legislative act which arbitrarily controls the actions of the individual or the use by him of his property, and still more one which destroys his title to property and transfers it to another individual, amounts to a judgment against him, which judgment is, of course, one rendered in a proceeding which lacks the essentials of due process of law procedurally considered."

He properly concludes:

> "and this reasoning, it must be admitted, still remains the only means by which the field of substantive rights may logically be brought under the operation of a limitation which, by its very words and historical application, is purely procedural in character." (Willoughby Vol. III, p. 1696)

A refusal to appropriate cannot be assailed on the ground that the procedures were improper unless the attack be that requirements for enacting legislation were not met. A refusal to appropriate is an exercise of the legislative function, wherein the Congress exerts a power not affecting and not circumscribed by individual rights to property or liberty. If it be viewed as a judgment, then it is a judgment which the Constitution authorizes the Congress to make, following the procedures therein prescribed for the enactment of legislation.

However, even if it should be decided that a refusal to permit expenditures for compensation is subject to attack under the Fifth Amendment, on the ground that it is arbitrary and discriminatory, Section 304 must stand as constitutional.

The Fifth Amendment contains no equal protection clause and does not prohibit discriminatory legislation. *Hirabyashi* v. *United States*, 320 US 81, 100; *Detroit Bank* v. *United States*, 317 US 329, 337; *Helvering* v. *Lerner*, 314 US 463; *Currin* v. *Wallace*, 306 US 1, 14; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 US 381, 401; *Stewart Machine Co.* v. *Davis*, 301 US 548, 584; Section 304 cannot successfully be assailed upon the premise that it discriminatorily deprived respondents of "liberty"[83] to receive compensation from the United States.

If the provision is assailable under the Fifth Amendment on these grounds, it must be shown to be so unreasonable and unsupported as to amount to an unwarranted depriva-

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[83] There is no property right to unearned compensation. *Embry* v. *United States*, *supra*.

tion of that liberty. The facts completely refute any such conclusion.

To demonstrate that degree of arbitrariness, respondents rely upon the personal character of Section 304. Their argument in essence is that an enactment directed against three named persons, *per se*, is so arbitrary as to deny due process. Significantly, they made no attempt to demonstrate that the facts regarding them did not objectively justify refusing to pay them. In their view, the evidence upon which Congress acted is immaterial; the enactment, being directed at only three persons, is automatically invalid.

The theory which they advanced has been rejected by the courts. In *Keokee Consolidated Coke Co.* v. *Taylor*, 234 US 224, 227, a state law prohibiting certain manufacturing enterprises from paying employees in scrip redeemable only in merchandise was alleged to be invalid under the equal protection clause of the Fourteenth Amendment. Speaking for a unanimous court, Mr. Justice Holmes said:

> "It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81, 55 L. ed. 369, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Patsone v. Pennsylvania, 232 U. S. 138, 144, ante, 539, 543, 34 Sup. Ct. Rep. 281. The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need."

Recently the same principle was declared by the court in *Hirabyashi* v. *United States*, *supra*, P. 100, wherein the court said:

> "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. Detroit Bank v. United States, 317 US 329, 337, 338, ante, 266, 270, 271, 63 S. Ct. 297, and cases cited. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent."

When it enacted Section 304, the legislature was dealing with a special problem left unremedied by existing legislation. It had before it substantial evidence that respondents were unqualified to draw compensation from the federal payroll. To cope with that evil, the Congress exercised its control over the public funds, confining the extent of its action to the known evil.

Section 304 was not arbitrary in the sense that no reasonable grounds existed for the action taken; nor may it be invalidated by the suggestion that others besides respondents might have been similarly dealt with, but were not.

The records in these cases contain no evidence that when Congress legislated in regard to the three respondents it did not encompass the entire class of persons deemed unfit to receive compensation because of their subversive activities and affiliations. On this point, the following is particularly pertinent:

> "We are told that the signs of an arbitrary preference are written on the statute because the exemption is confined to this particular insolvent when it might have been extended to all other insolvents engaged in a like business. There is nothing to show that any Maryland railroad other than this one was in the hands of a receiver. The assailants of the statute have the burden of proving everything essential to their case." *Williams* v. *Baltimore*, 289 U. S. 36, 42; *Pullman Co.* v. *Knott*, 235 U. S. 22, 25.

We have shown that the power to compensate and to control federal expenditures may be exercised in personam. Respondents, attacking Section 304 as a denial of due process, have not shown that it was unjustified by the facts known to the Congress; nor have they shown that the Congress selected certain persons for action, leaving unaffected others similarly situated. There has been no proof that Section 304 was arbitrary in either respect; and respondents' argument reduces merely to a contention that a statute directed to three named persons must be arbitrary. The answer to that contention is that

> "Congress is the law making branch of the Government and laws made by it are not unconstitutional because they are special, applicable to one or some persons, rather than of general application . . ." *The Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 18.

The method adopted in Section 304—prohibiting the use of public funds to pay plaintiffs—was reasonably and directly related to the object sought—to prevent the expenditure of public funds to pay compensation to persons Congress deemed unfit to receive them.

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U. S. 502, 525.

VII.

CONCLUSION.

Consideration of the ultimate question will be best aided by addressing ourselves to a few simple inquiries:

1. Was the Congress confronted with any problem requiring, or which might reasonably be thought to warrant, attention of that body?

2. Was the subject matter one within the jurisdiction of Congress, or did it lie in some field forbidden to Congress by the Constitution?
3. What steps did Congress take to inform itself as to the nature and extent of the problem which had been pressed upon its attention and which already had been examined to some extent by its committees?
4. What remedy was adopted?
5. Was this remedy appropriate?

If we find that the problem was real, not imaginary, that the subject was one over which Congress had authority, that the legislative procedures in and of themselves violated no private rights, and that the remedial measure adopted was appropriate, the ultimate question of constitutionality answers itself, in favor of the legislation. We are of opinion that the record requires an ultimate resolution in favor of the statute. Examination of the subject matter by the Congress, and particularly by the Kerr subcommittee, left no doubt that Congressional action was required.

Mr. Chief Justice Hughes, in *T. & N. O. R. Co.* v. *Bro. of Ry. & S. S. Clerks*, 281 U. S. 548, at 570, said:

> "In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures."
> "* * * the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation." (*Wilson* v. *New*, 243 U. S. 332, 346. See also *U. S.* v. *Darby*, 312 U. S. 100).

The problem with which Congress was dealing was that of subversive activities among Federal civil service employees. Earlier legislation had been adopted. (Hatch Act; Emergency Relief Appropriation Act of 1941; limitations in various other appropriation acts.) But the problem persisted. The earlier statutory provisions did not deal with it in its entirety. Some of these provsions were tempo-

rary in nature. Congress felt a responsibility not to appropriate public funds to persons in Federal employment who were engaging in activities of the general type condemned by Hatch Act (Sec. 9-A). Not only was the subject matter within the jurisdiction of Congress, but the field had already been partially occupied by Congress, and this through use of its power to withhold public funds.

Two courses were open. The Congress could have proceeded along broad, general lines and provided that no part of appropriated funds should be used to pay any part of the compensation of any executive employee who was a member of any of the organizations which the Attorney General had held to be within the scope of Public Law No. 135 (e. g., American League for Peace and Democracy). But the circumstances were such that a *general* proscription would have been arbitrary and extremely unfair to many people who had innocently joined such "communist-front" organizations. The Attorney General himself had so warned Congress.

A far less objectionable course was the one Congress adopted. It proceeded to investigate individual cases, and to withhold appropriations in those instances only where it appeared that the employee complained of was not merely a member of one such organization, but many, and where, in addition to his membership in such organizations, his speeches, writings, and general activities were such as to make it, in the opinion of Congress, inconsistent with the public welfare to continue to appropriate public funds to him.

It is urged that Congress can deal with offices, but not with individuals. But if Congress is attempting to reach a legitimate end, it may employ such means as are appropriate. No express provision of the Constitution forbids Congress to deal with individuals where that is necessary or appropriate.

> "Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new

conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so the correcting statute may be as narrow as the mischief. The constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which existing general laws are incompetent to cope. The special public purpose will then sustain the special form . . . The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts. * * * If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. * * * If special circumstances have developed, and circumstances of such a nature as to call for a new rule, the special act will stand." (Mr. Justice Cardozo in *Williams* v. *Mayor & City Council of Baltimore*, 289 U. S. 36, 46. (1932)).

And because Congress was dealing in Section 304, not with occupants of fixed identifiable, statutory offices, but with employees paid from lump sum appropriations, the only appropriate method was by exception to the general appropriation acts.

It is argued that Congress could reduce the compensation, but could not withhold it entirely. But we are dealing with employees paid from lump sum appropriations. How could Congress reduce the salaries of respondents except by name, and still provide for the salaries by lump sum appropriations? The statute is therefore not to be read as a law applying to three named persons only, not as special legislation singling out individuals for a special rule of law, but as providing *exceptions* to the general directions and authorzations otherwise made by law. Section 304 was not a "rider" to an appropriation act, dealing with a subject foreign to the balance of the Act. It was intimately related to the Act, forming an exception thereto. Its inclusion in an appropriation act was not only appropriate, but

the most appropriate method Congress could have adopted.

Section 304 was not addressed to respondents, though it referred to them. It imposed no obligations on them, and conferred no justiciable rights upon them. It required no one to perform any act. It was a direction to the disbursing officers, just as the Public Contracts Act considered in *Perkins, et al.* v. *Lukens, et al.*, 310 U. S. 113, was held by the Supreme Court to be a direction to the contracting officers of the Government, conferring no justiciable rights on those contractors adversely affected.

It is objected that Section 304 is arbitrary, special legislation, singling out respondents for a rule not applicable to all. Such a conclusion is not warranted. The evidence before Congress warranted Congress in going as far as it went in Sec. 304. It is not required that legislation completely exhaust the field to which it is addressed.

> "We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation."
>
> (Mr. Justice Frankfurter in *Kirschbaum* v. *Walling*, 316 U. S. 521.)

In the *Jones* and *Laughlin* case (301 U. S. 1, 46) the National Labor Relations Act was challenged on the ground, *inter alia*, that it proscribed certain activities of employers, but left labor unions to do acts of the same character free from the restrictions of the Act. This argument was rejected, the Supreme Court, through Mr. Chief Justice Hughes saying:

> "The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with in-

creased chances of success in bringing out, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy, or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 S. Ct. 66; *Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 S. Ct. 856; *Miller* v. *Wilson*, 236 U. S. 373, 384, 59 L. ed. 628, 632, 35 S. Ct. 342, L. R. A. 1915 F., 829; *Sproles* v. *Binford*, 286 U. S. 374, 396, 76 L. ed. 1167, 1183, 52 S. Ct. 581. The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits."

Even therefore if it were conceded that Section 304 did not reach all those as to whom Congress might have made similar provision, the statute would not thereby be invalidated. Nothing prevents the legislature making a cautious approach, step by step, in dealing with a problem confronting it. *To have done otherwise in this case, in the light of the warning provided by the Attorney General, would have been to take the very arbitrary action Section 304 was designed to avoid.*

One who alleges that legislation is arbitrary or discriminatory as to him is under a burden of showing in what respect that is true. The mere allegation of discrimination is not enough. And in the present case, respondents failed, both in their petitions and in their briefs, to make any claim that those persons embraced within Section 304 are not the only persons similarly situated. All that the Constitution requires of legislation is that it generally impose similar burdens or restrictions on all similarly situated. The courts cannot presume that Sec. 304 does not do so.

Nor is there any reason why Congress, in the exercise of its control over public funds, cannot make distinctions

of degree as well as kind. (*Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495.) If Congress was of opinion that appropriations to pay the salaries of some persons investigated would not be for the general welfare, it could so provide, even though it reached a contrary conclusion as to others investigated, in the light of the evidence.

Respondents are not consistent in their attack on Sec. 304 when they condemn it as singling out individuals, rather than dealing with general categories, for they recognize that an act may be a bill of attainder although it deals with classes, and the persons to be affected are not named in the bill. In that view, if Section 304 were held invalid, the validity of the Hatch Act and of every other measure now on the books or hereafter passed, by which Congress undertook to deny use of Federal funds for payment of salaries to members of proscribed *classes* would be drawn in question.

But the implications of a decision against the Government in the present cases would go much further. If the court should undertake to set aside Sec. 304 because of a claimed Congressional purpose to remove plaintiffs from office or employment, will it not thereby subject to the possibility of judicial scrutiny every limitation on an appropriation act; every reduction of an employee's previous compensation, every abolition of an agency or office, every failure or refusal to continue prior appropriations, where the employees adversely affected claim that the real purpose was to remove them by freezing them out or starving them out?

Furthermore, it is clear that under settled rules of construction, Section 304 is inseparable from the remainder of the Act of which it is a part, and this Section can not be held invalid without the invalidity extending to the entire statute.

Respondents and the Attorney General were in accord in their original briefs that the Act would not have become law if Section 304 had been deleted. That was the basis of

the Attorney General's contention that Section 304 was not entitled to the usual presumption of validity.

The President's message, after he signed the Act, is significant in this regard:

> "The Senate rejected the compromise as incorporated in this bill once, and agreed to it only after the House conferees *had refused to agree to any bill* without a provision aimed at the removal of these three named individuals."

While not agreeing with the President's legal conclusions as to the effect of Sec. 304, we agree thoroughly that the Urgent Deficiency Appropriation Act of 1943 would not have become law without containing Section 304 or some satisfactory substitute. The intention of Congress in this respect is clear.

The Court cannot find in the legislative history of the Urgent Deficiency Appropriation Act of 1943 any support for the proposition that Congress would have passed the Act without Section 304. It can not find any expression of Congressional intent that the Act should stand if Section 304 fell. The history of the Act, the insistence of the House through five conferences with the Senate, the language of the Senate conferees in reporting to the Senate, and the language of the President in signing the Act "reluctantly," with Section 304, because he thought the alternative was *no appropriation Act*, all disclose a Congressional intention that the Act should become effective wholly or not at all.

It is alleged that the Act does not represent a true or legitimate exercise of the Congressional power over appropriations, but that the exercise of the power over appropriations was a mere cloak for a more sinister purpose,—that of invading the executive prerogative and effecting a removal from executive employment. *We may concede at once that many members of Congress desired that respondents should be removed from office.* The fact is, however, that the statute as finally adopted did not remove the re-

spondents, or either of them, from office, nor did it require the Executive to do so. What it did was to say to the disbursing officers of the Government: You may not draw from the Treasury any public funds to pay as salaries to the respondents after November 15, 1943, unless prior to that date they have been appointed and confirmed as herein provided. The Act did not require the Executive to do any act of any kind, by November 15, or any other date, or at all. What it did was merely to make unavailable *any* public funds for payment of salaries for any services after that date, unless the President exercised the option of making the appointment. Whether the President made the appointment or did not do so, no compulsion was placed upon him and no invasion of his prerogatives was involved.

The Act was clearly an exercise of the power over appropriations and not an attempted exercise of a power of removal. When Congress has desired to effect removal it has not been found wanting in language to express its desire.

There is no distinction more readily apparent than that between office and compensation. This is perhaps best illustrated by the fact that as of January, 1945, there were on the rolls of the Federal Government 311,000 persons who were officers or employees but to whose offices or employment no compensation attached.

The Constitution itself, while recognizing the need for officers and employees in the various departments of Government, does not require that any of them, save the President, the Judges, and members of the legislature, *shall receive compensation*. It will be noted, also, that these provisions, requiring the payment of a compensation and providing specifically that the compensation of *particular incumbents* shall not be reduced, is a direct precedent of the highest order of authority, for the proposition that salaries may be dealt with as to particular identifiable and identified persons. The requirement against reducing salaries speaks in terms of the *officer*, not the *office*.

The distinction between office and compensation has been recognized from earliest times, by the courts, by the Comptroller General, and by others in positions of authority.

There have, indeed, been times when Congress, by failure to enact annual appropriations acts before the beginning of a fiscal year, has left agencies and instrumentalities without funds for current operation. If the fact that no funds were available for salaries were tantamount to removal from office, the whole business of Government would in such circumstances cease, for the former officers of Government could not during the interim exercise any of the powers, authorities and duties attaching to their offices, or, if they did so, any action taken or obligations entered into, might readily be attacked as *ultra vires*.

But enough has been said to show plainly that the holding of office or employment is a thing distinct from receiving compensation, and that the status may exist without the emoluments.

It may be conceded that in general and subject to some limitations not yet determined, the matter of removal of Federal executive employees is the business of the Executive; but it is no less true that the making or withholding of appropriations is the business of Congress.

As said by Mr. Justice Frankfurter in *Korematsu* v. *United States*, 323 U. S. ——, 89 L. ed. Adv. Op. 202:

> "To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not mine."

There are many areas in which the exercise of acknowledged powers by one of the three great departments of Government may impinge upon one or both of the others. But this, in the very nature of things, is an inevitable concomitant of our system. The remedy is one that depends upon mutual cooperation between the departments and not

upon either of them being relegated to a position of dependency upon the other in matters over which both have some jurisdiction, as is particularly the case in matters of regulation and control over Federal civil employees in the departments and independent agencies of Government. The very fact that such areas of possible conflict exist is the strongest evidence that when occasional conflicts arise they are not to be dealt with by *judicial* action, for the questions are primarily political, not justiciable, and the immediate effect of a judicial determination would in all likelihood be to produce rather than to discourage that "collision * * * between the Executive and Legislative Departments of the Government" which has caused the Supreme Court in such cases as *Mississippi* v. *Johnson*, 4 Wall. 475, to refuse to interfere in what was clearly a political controversy, although there, as in most other such cases, injury to private rights was claimed.

Mr. Justice Brandeis, in *Myers* v. *United States*, said:

> "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative, and judicial. Obviously the President can not secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices, indispensable for that purpose. *Or, because Congress having created the office, declines to make indispensable appropriation.* Or, because Congress having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congres. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted. Compare *Ken-*

dall v. United States. (12 Pet. 524, 613, 626." (Italics supplied.)

Respondents have cited Madison, The Federalist, No. 47. They fail to cite No. 48, *et seq.* In No. 48 Madison says:

> "It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as *to give to each a constitutional control over the others*, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." (Italics supplied.)

And in The Federalist, No. 51, Madison says:

> "But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates."

Not only are these areas of possible conflict between the great departments of Government inherent in our system of checks and balances, but there is ever present the possibility that in the exercise of public rights and authority private rights will be affected.

As Mr. Justice Roberts said in *Nebbia* v. *New York*, 291 U. S., at p. 524:

> "These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need."

Of the consequential injuries resulting from the exercise of public authority, Cooley has written:

> "It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others. This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed; but in neither case can the parties whose interests would be injuriously affected, enjoin the act or claim compensation from the public. The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the constitution will present no impediment. The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has precluded itself from such new grant, the incidental injury can constitute no obstacle. But indeed it seems idle to specify instances, inasmuch as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and, if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment." (Cooley, 8th ed., pp. 795, 796.)[84]

In the present case, no vested rights of respondents were affected. They had at most an interest in expectancy.[85] The statute had no retroactive application. It was passed in July and was not to become effective until November.

[84] Cf. *U. S.* v. *Darby*, 312 U. S. 100, 118, where it was urged that the Act was invalid because it required plaintiff to conform his purely local business to the requirements of the Act.

[85] See Cooley, p. 749.

They knew that if they performed services after November 15, 1943, and the condition of the statute had not been met, they would receive no salaries. They were charged also with knowledge that their executive superiors had no authority to obligate the Government to pay them after November 15, 1943.

The disbursing officers of the Government recognized that they were not authorized after November 15, 1943, to withdraw any money from the Treasury to pay the plaintiffs. Any appropriations theretofore made have long since been expended or have reverted to general funds of the Government.

A judgment of the courts in favor of respondents could not today be paid except by virtue of subsequent appropriations made by Congress for that purpose. The Congress has already stated unequivocally, through Section 304, that it is unwilling to make such appropriation. The control of the public purse is lodged exclusively in Congress. Congress is directed by the Constitution to make appropriations only for the general welfare. Its action in adopting Section 304 is equivalent to a finding on its part that an appropriation to respondents would not be for the public welfare. The determination of the Congress not to permit the withdrawal of public funds from the public Treasury should be respected.

As said by this Court in *Reeside* v. *Walker*, 11 How. 272:[86]

> "The difficulty in the way is the want of any appropriation by Congress to pay this claim. It is a well known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. * * *
>
> "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned. Any

[86] Plaintiff Reeside sought to recover compensation for services rendered the Post Office Department in the transportation of mail.

other course would give to the fiscal officers a most dangerous discretion.

"*Hence, the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it.* * * But without such an appropriation it cannot and should not be paid by the Treasury, whether the claim is by a verdict or judgment, or without either. * * *"

Respondents having elected to perform services after November 15, 1943, in the face of the statute which denied funds with which to compensate them, the present suits should be dismissed. Certainly a judgment should not be rendered which can under no circumstances be effective without a subsequent appropriation by Congress,[87] — an appropriation which Congress in the exercise of its discretionary powers has already determined would not be in the public interest.

Respectfully submitted,

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April 19, 1946.

[87] A fact which clearly distinguishes this case from that of *Tolerton* v. *Gordon*, *supra*, relied upon by respondents.